Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

TERRY EUGENE PENNEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether in light of *Georgia v. Randolph*, 547 U.S. 103 (2008) an intermittent girlfriend has authority to consent to a warrantless search of a residence when the true owner of the property has told law enforcement before the search that he had removed her from his residence, that he did not want her staying on the property any longer and that she be kept off his property.

2. Whether the Due Process Clause forbids Penney's 1976 state court judgment to be used as a predicate conviction for 18 U.S.C. § 922(g) because: (A) the Defendant's due process rights pursuant to *Boykin v. Alabama* were violated; (B) the 1976 judgment was never signed by the trial court in violation of Tennessee law; and (C) the obvious errors and inconsistencies in the paperwork that indicate different criminal offenses and different sentences.

3. Whether Penney lost his Second Amendment right to possess a firearm as a result of his 1976 state court conviction because Tennessee law still granted him his Second Amendment right to bear arms.

4. Whether any law subsequently passed by the Tennessee legislature prohibiting Penney from owning or possessing a firearm amounts to an unconstitutional Ex Post Facto law in violation of the United States Constitution.

5. Whether the Fourth Amendment requires that the triggering event in an anticipatory search warrant be expressly contingent that the contraband be on a "sure and irreversible course" to the place to be searched.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE BY THE COURTS

1. *United States v. Penney*,[1] 576 F.3d 297 (6th Cir. 2009), rehearing and rehearing *en banc* denied (Sept. 24, 2009);

2. *United States v. Penney*, 2005 WL 1668292 (E.D. Tenn. July 18, 2005);

3. All other district court opinions were unpublished.

BASIS FOR JURISDICTION

The Petitioner is seeking review of a final Judgment entered by the Sixth Circuit Court of Appeals on August 7, 2009. The Petitioner timely filed a Petition for Rehearing *En Banc* which was denied on September 24, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Sup. Ct. R. 10(b) & (c). Pursuant to Sup. Ct. R. 29.4(b), notice of this Petition has been served upon the Solicitor General of the United States.

[1] The correct spelling of Petitioner's name is Penney, however, it was misspelled on the lower court's docketing sheet as Penny.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED IN THIS CASE

1. U.S. Const. Amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 18 U.S.C. § 921(a)(20) provides:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include – (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

3. 18 U.S.C. § 922(g)(1) provides:

> (g) It shall be unlawful for any person – (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. Tenn. Code Ann. § 39-17-1307(b)(1)(B) provides "(b)(1) A person commits an offense who possesses a firearm, as defined in § 39-11-106, and (B) has been convicted of a felony drug offense."

5. Tenn. Code Ann. § 39-17-1351(j)(3) provides:

> (j) The department shall not deny a permit application if: (3) The applicant, who was rendered infamous or deprived of the rights of citizenship by judgment of any state or federal court, has had the applicant's full rights of citizenship duly restored pursuant to procedures set forth within title 40, chapter 29, or other federal or state law; provided, however, that the provisions of this subdivision (j)(3) shall not apply to any person who has been convicted of burglary, any felony offense involving violence or use of a firearm or any felony drug offense involving a Schedule I, II, III, IV or V controlled substance. If the applicant has been convicted of a felony drug offense involving a Schedule VI controlled substance, the provisions of this subdivision (j)(3) shall not apply if the offense

occurred within ten (10) years of the date of application or renewal.

6. Tenn.R.Civ.P. 58 provides:

> Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry: (1) the signatures of the judge and all parties or counsel, or (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.
>
> Following entry of judgment the clerk shall make appropriate docket notations and shall copy the judgment on the minutes, but failure to do so will not affect validity of the entry of judgment. When requested by counsel or pro se parties, the clerk shall forthwith mail or deliver a copy of the entered judgment to all parties or counsel. If the clerk fails to forthwith mail or deliver, a party prejudiced by that failure may seek relief under Rule 60.

STATEMENT OF THE CASE

On August 19, 2003, a barefoot Davota Bowman ("Bowman") walked into the Soddy Daisy Police Department at 8:15 a.m. claiming that she had been assaulted by her intermittent boyfriend, Terry

Penney ("Penney"). *United States v. Penney*, 576 F.3d 297, 301 (6th Cir. 2009).

Penney was a life-long resident of Soddy Daisy. (Trial Transcript, 8/2/05, p. 730). He owned his own residence located at 10609 Dayton Pike, Soddy Daisy, Tennessee. *Penney*, 576 F.3d at 301. The residence was 3 miles from the Soddy Daisy Police Department on the same road, Highway 27. *Id.* Penney's family had owned a business called Penney's Place since 1948 which was located directly across the street from his residence. *Id.*

According to Detective Mike Sneed ("Sneed"), Bowman advised that she had "ran out of the house and flagged someone down to bring her to the police department." (Transcript of Motion to Suppress, 7/26/04 p. 8). After being at the station for 30-40 minutes, Bowman told Sneed that she saw in a trash can a "smoking device." *Id.* Sneed asked her "about narcotics specifically" and she replied, "I am sure if you go look that you'll find exactly what you are looking for." *Id.* at 8-9.

At the same time, Penney walked into the Soddy Daisy Police Department. *Penney,* 576 F.3d at 301. He advised officers that he wanted Bowman immediately removed from the residence. *Id.* He objected to her going back and wanted her off his property. The officers arrested Penney for assaulting Bowman and transported him to the local jail. *Id.*

The police had been called earlier that month to Penney's residence after Penney and Bowman had

gotten into an argument. *Id.* The report dated August 2, 2003 stated that Penney "had pushed her out of the front door of the residence and she had left." *Id.*

On August 19, Bowman did not have a key or any other means to gain entry. (Transcript of Motion to Suppress, 7/27/04, p. 41-42). Bowman gave the police her home address in Graysville, Tennessee and a separate home telephone number. *Id.* at 35. Her only belongings at the house were a bag full of clothes indicative of an overnight guest. *Id.* at 45.

Sneed further testified that Bowman told him that "in the last several months they had broken up, and they were getting back together and she had been there since Sunday [two days prior] . . . and they were trying to work things out." *Id.* at 9. Bowman also told another officer that she was called the day before by Penney "asking her to come to his house." *Id.* at 43.

Over Penney's objection, the officers and Bowman proceeded to Penney's residence. When they arrived, Bowman went to the front door, but it was locked. *Id.* at 56. She did not know how to open it. *Id.* She then proceeded to a side door and used "some type of trick" to open it. *Id.* at 56.

Special Agent Josh Melton testified that Bowman "assisted in the search of the house." (Transcript of Motion to Suppress, 7/26/04, p. 160). He stated that she showed them guns that were in the house and a can used as smoking paraphernalia. *Id.* Agent Melton

described Bowman's demeanor as "very aggressive." *Id.* at 171.

While in the residence, the officers searched the entire house including all closed containers. *Id.* at 14-16. They found a green plastic tote which contained 102 grams of marijuana. (Trial Testimony, 7/26/05, p. 34-35). They also found approximately 20 guns, $1,300 in cash and numerous types of scales. *Id.* at 34-36. Sneed admitted that there was no evidence to suggest that the $1,300 was anything than other lawful proceeds from Penney's Place. (Trial Transcript, p. 207-208).

Bowman testified at the suppression hearing. (Transcript of Motion to Suppress, 9/27/04, p. 4). She testified that her address on August 19, 2003 was the Graysville address. As to any other question, she pled the Fifth. *Id.* at 7. Defense counsel introduced several exhibits such as a telephone bill, life insurance documents, and letters from her attorney which were all addressed to Bowman at her Graysville address. *Id.* at 15-20.

Attorney Larry Roddy testified. He represented Penney following his domestic assault arrest on August 19 and prepared an Affidavit that Bowman had executed. (Transcript of Motion to Suppress, 9/13/04, p. 6). Bowman stated in her affidavit that she did not live at Penney's residence when the domestic assault occurred. *Id.* at 7-42. The affidavit was admitted as evidence.

After August 19, 2003, law enforcement continued to monitor Penney off and on until early January, 2004. In early January, 2004, law enforcement began using a CI to arrange a drug transaction with Penney wherein the CI would bring marijuana and Penney would locate a purchaser. *Id.* at 63.

On January 12, 2004, the CI called Penney, told him that he would be in the next day, and that he had marijuana. *Id.* at 64. On the same day, Sneed obtained an anticipatory search warrant from the Soddy Daisy Municipal Court Judge. The triggering event to the anticipatory search warrant stated: "Penney meets with the CI to examine and attempts to purchase the narcotics by obtaining funds or promising to obtain funds in the near future in order to complete the transaction."

On January 13, 2004, at approximately 12:20 p.m., the CI went to Penney's residence but the purchaser was not there. While the CI was present, the purchaser called and told Penney that he was on his way. *Id.* at 64. The CI left, and made several calls to Penney later that day to see if the purchaser had arrived.

The purchaser, "Cotton," testified at trial that he arrived at Penney's residence at 5:35 p.m. (Transcript of trial, 7-28-05, p. 399). He saw Penney, the two men talked and they went inside. *Id.* He recalled Penney fixing a large bowl of watermelon and sitting in his recliner. *Id.* He was inside for ten minutes when the phone rang and heard Penney say, "yeah, come on up

here, like that, you know." *Id.* A few minutes later, somebody knocked and came inside. *Id.* at 399-400. The CI said he wanted to see the money first. *Id.* at 400. Cotton and the CI went outside. *Id.* They went to the passenger side of Cotton's vehicle, unlocked it, reached into the back seat, and Cotton had the money "in two black garbage bags." *Id.* The CI told Cotton that the drugs were down the road and that he would go and get them. *Id.*

Law enforcement immediately came onto Penney's property. Cotton testified that the officers were wearing either blue or black jackets with decals and they were "hollerin' police department . . . " *Id.* at 402. Cotton recalled hearing "something hit the front door" but remembered that Penney had a large dresser pushed up against the front door. *Id.* at 402. He recalled hearing a shotgun blast go off. *Id.* at 403. Cotton remembered hearing an officer yell, "Terry, put the gun down" and then he heard Terry say, "Is that you, Sneed?" He recalled hearing the officer say, "yeah, Terry, put the gun down."

Cotton testified that neither the money nor the drugs ever were inside Penney's residence and stayed locked in his truck. *Id.* at 412-414. He described Penney's demeanor as "his normal self" and that he was just "sitting over there eating watermelon cut up in a bowl on the recliner." *Id.* at 415-416. Cotton further explained that he never saw a gun that night nor during any of his prior transactions with Penney. *Id.* at 416-417.

Penney testified that at all times, the blinds across the front windows of his house were closed. *Id.* at 749-750. He stated, "all I could think about was I thought I was getting robbed. And I didn't want to go through that again, put in the floor, put guns to my head. I was scared." *Id.* at 756.

After Sneed secured the scene and determined that there was nobody else present in Penney's house, he noticed that ATF officer, Paris Gillette, had been shot through the front window. (Transcript of Motion to Suppress, 9/13/04, p. 79-80). Agents began giving him first aid. *Id.*

According to Detective Sneed, the agents did not find any drugs inside the house. They found five (5) weapons and approximately $6009 in cash. *Id.* at 82-83, 194. Detective Sneed testified that he found Cotton's money, $35,005, in the truck that was parked out back. *Id.* at 195. There were no drugs on Penney or inside his residence. *Id.* at 203.

Penney was arrested that night and indicted for various drug and weapon offenses on February 11, 2004. He entered not-guilty pleas.

Penney filed various pre-trial motions that are the subject of this Writ of Certiorari. They included the following: (1) a motion to suppress the search of Penney's residence on August 19, 2003 arguing his intermittent girlfriend, Bowman, lacked authority to give consent to search his residence; (2) a motion to dismiss the § 922(g) counts and a motion to reconsider arguing that (a) he was not a convicted felon;

(b) that his plea was not knowing, voluntary and intelligent in light of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); (c) that there were substantial errors in the paperwork showing that he was convicted of a misdemeanor; (d) that the judgment was unsigned and not entitled to a presumption of regularity; and (e) in the alternative, that should this offense be classified as a felony, given Tennessee's law at the time, that he never lost his right to possess a gun and that any restriction on Penney's constitutional right to bear arms would be an unconstitutional Ex Post Facto Law; and (3) a motion to suppress the anticipatory search warrant on January 13, 2004 arguing that the triggering event never occurred and that it violated the "sure and irreversible course" rule.

The government filed two responses and Penney filed his reply.

Penney's 1976 unsigned Tennessee state court judgment has been the source of much debate. Penney was indicted on April 1, 1975 in the Hamilton County Criminal Court for feloniously selling a controlled substance.

On May 19, 1976, he allegedly appeared in Hamilton County Criminal Court before the Honorable Judge Campbell Carden. The courtroom minutes state that Penney pled guilty to "selling a controlled substance" and that he received a sentence of eleven (11) months, twenty-nine (29) days which is typically a misdemeanor sentence. The Court continued

Penney's case until June 28, 1976 for Penney to file a Petition for Probation.

On June 16, 1976, Penney filed a sworn Petition for Probation. The Petition for Probation, signed by both Penney and his attorney before a Notary, states that Penney pled guilty to "simple possession of marijuana" which is a misdemeanor and received a sentence of eleven (11) months, twenty-nine (29) days.

On June 28, 1976, Penney allegedly appeared back before Judge Carden. The June 28, 1976 minutes state that Penney's Petition for Probation was sustained. They further state that Penney was placed on probation for a period of five (5) years.

Although the Judgment is dated June 28, 1976, it was never signed by Judge Carden in violation of Tenn.R.Civ.P. 58. The Judgment reflects that Penney pled guilty to "Attempt to Commit a Felony" not "selling a controlled substance" as listed in the courtroom minutes or "simple possession" as listed in Penney's sworn Petition.

Penney introduced an Affidavit from the Official Court Reporter for Hamilton County Criminal Court who reviewed the official audiotapes from May 19, 1976 and June 28, 1976. There were recordings on both dates but of other criminal defendants. Ms. Abigail Pearce listened to them but there was nothing in those recordings to suggest that the trial court talked to, acknowledged or ever conducted any voir dire with Penny.

The Tennessee Supreme Court did not adopt the necessary voir dire procedures to ensure knowing, voluntary and intelligent pleas mandated by *Boykin v. Alabama*, 395 U.S. 238 (1969) until one year after Penney pled guilty in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). *Mackey* involved the exact same state court (Hamilton County Criminal Court) in which Penney pled guilty in May/June 1976.

After Penney was indicted in February, 2004, he sought state court remedies to attack his 1976 conviction. He filed a Motion to Correct Judgment in the Criminal Court of Hamilton County, Tennessee as well as a Petition for Post-Conviction relief. Penney's state law claims were dismissed. Penney appealed but the Tennessee Court of Criminal Appeals affirmed. See *Penny v. State of Tennessee*, 2005 WL 3262929 (Tenn.Crim.App., December 2, 2005), *cert. denied* March 27, 2006). Both the Tennessee Supreme Court and the United States Supreme Court denied Penney's writ of certiorari. *Id.*

The District Court denied Penney's Motions to dismiss and to reconsider the 922(g) counts in Orders dated March 25, 2004 and May 14, 2004 without a hearing. (Memorandum and Order, 3/25/04, Appendix, p. 74) (Memorandum and Order, 5/14/04, Appendix, p. 45). The Court did set an evidentiary hearing on Penney's motions to suppress related to the two searches.

A magistrate conducted a hearing on July 26, July 27 and September 13, 2004. The magistrate

entered a Report and Recommendation denying the motions. (R & R, Appendix, p. 92). Penney timely filed an objection and the District Court entered a Memorandum & Order adopting the R & R. (Memorandum & Order, 11/9/04, Appendix, p. 77).

Penney was subsequently indicted in a second superseding indictment charging Penney as follows.

> *Count 1*: Conspiracy to distribute 5 kg or more of cocaine hydrochloride;
>
> *Count 2*: Conspiracy to distribute 100 kg or more of marijuana;
>
> *Count 4*: On August 19, 2003, having been previously convicted in a court of a crime punishable by imprisonment for a term exceeding one year, possessing a firearm and ammunition (lists 31 different firearms and ammunition) in violation of 18 U.S.C. § 922(g);
>
> *Count 5*: On August 19, 2003, possess with the intent to distribute marijuana;
>
> *Count 6*: On August 19, 2003, possess a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c);
>
> *Count 7*: On August 19, 2003, possessing a stolen firearm in violation of 18 U.S.C. § 922(j);
>
> *Count 8*: On August 19, 2003, possessing a firearm with the manufacturer's serial number removed, obliterated and altered in violation of 18 U.S.C. § 922(k);

Count 10: On October 7, 2003, attempted to possess with intent to distribute 5 kg of more of cocaine hydrochloride;

Count 11: On October 7, 2003, attempted to possess with the intent to distribute marijuana;

Count 12: On October 14, 2003, attempted to possess with the intent to distribute 5 kg or more of cocaine hydrochloride;

Count 20: On January 13, 2004, attempt to kill an officer of the United States, Paris Gillette, while such officer was engaged in the performance of his official duties in violation of 18 U.S.C. § 1114;

Count 21: On January 13, 2004, discharging a firearm during and in relation to a crime of violence, i.e. attempt murder, in violation of 18 U.S.C. § 924(c)(1)(A)(iii);

Count 22: On January 13, 2004, possession with the intent to distribute marijuana;

Count 23: On January 13, 2004, possessed firearms in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c);

Count 24: On January 13, 2004, in furtherance of a major drug offense, with the intent to intimidate, harass, and injure, did fire a weapon into a group of two or more persons in violation of 18 U.S.C. § 36(b)(1);

Count 25: On January 13, 2004, having been previously convicted in a court of a crime

> punishable by imprisonment for a term exceeding one year, possessing a firearm and ammunition (lists 7 different firearms and ammunition) in violation of 18 U.S.C. § 922(g).

The jury trial began on July 26, 2005 and continued for six (6) days. Penney timely reserved his objection to his status as a convicted felon. (Trial Transcript, 8/2/05, p. 867-868).

On August 3, 2005, the jury returned verdicts of guilty as to Counts 1, 2, 4, 5, 6, 8, 10, 11, 12, 20, 21, 22, 23, 24, & 25. The jury found Penney not guilty of Count 7.

Penney filed several objections to the PSR. On November 28, 2005, Penney was sentenced to 895 months in the BOP, 5 years supervised release, fined $25,000 and ordered to pay a special assessment of $1,500. Penney timely filed a notice of appeal.

The Sixth Circuit entered its opinion affirming the Judgment on August 7, 2009. *United States v. Penney*, 576 F.3d 297 (6th Cir. 2009). Judge Merritt dissented. *Id.* at 317-18. Penney timely petitioned for a rehearing *en banc* which the Sixth Circuit denied on September 24, 2009. (Order denying rehearing and rehearing *en banc*, 9/24/09, Appendix, p. 132).

ARGUMENT

1. Whether in light of *Georgia v. Randolph*, 547 U.S. 103 (2008) an intermittent girlfriend has authority to consent to a warrantless search of a residence when the true owner of the property has told law enforcement before the search that he had removed her from his residence, that he did not want her staying on the property any longer and that she be kept off his property.

As Justice Merritt noted in his dissent, the Sixth Circuit does not deny, nor point to any factual disputes. *Penney*, 576 F.3d at 317-18. The facts are clear in the record. *Id.* at 317.

On the morning of August 19, 2003, Penney threw Bowman, his on-again, off-again girlfriend, out of his house. She told the police that she was thrown out. The best evidence of this fact was that the police observed her barefoot. Penney followed her to the police station and told the officers that he kicked her out and did not want her staying there any longer or coming back. He specifically asked the police to keep her off his property. As Justice Merritt noted, this is clear and unambiguous in the record. *Penney*, 576 F.3d at 317. Therefore, the police had actual notice before conducting any search that whatever authority Bowman had in the premises had ended; that Bowman was not welcome back; and that Penney, the true owner, specifically objected to allowing Bowman back to his house.

As Justice Merritt stated, "it is beyond me to understand how the girlfriend could have any kind of authority, actual or apparent, from Penney to consent to a search of his home." *Id.* Merritt accused the majority of "not perform[ing] its judicial duties in an impartial manner" and stated that the Fourth Amendment in this case has been "openly abridged." *Id.* at 317-18. He concluded, "what should be an open and shut Fourth Amendment violation is spun as a close case and decided in favor of the police." *Id.* at 318.

In *Georgia v. Randolph*, 547 U.S. 103, 115, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2008), the United States Supreme Court held one co-tenant wishing to grant authority to search is not authorized to grant consent over a present and objecting co-tenant. *Randolph*, 547 at 114.

In *Penney*, the Majority acknowledged that Penney's demand to police that Bowman be removed "deserves greater consideration." *Penney*, 576 F.3d at 309. The Majority recognized that "if an occupant with formal authority over the premises takes affirmative and unambiguous action to break relations with a live-in lover and to exclude the latter from the formerly shared dwelling, it may not be reasonable to believe that the latter retains common authority to consent to a search." However, the Majority, somehow, sidesteps the issue claiming that because Soddy Daisy officers knew "about this particular couple" and knew that they had reconciled in the past, that therefore, their argument on August 19 was not any different. This rule is unreasonable and illogical.

First, the police do not make these same assumptions in domestic violence situations when they remove persons from homes, put them in jail, and commonly enter no contact conditions of bond.

Second, this rule would require local police officers to be fortune tellers or relationship therapists. Is it more reasonable to assume that the two would get back together or that Penney did not want Bowman at his house?

A better rule is one that is clear and unambiguous which states that when the owner of the premises unequivocally informs law enforcement prior to a search that he objects to another co-tenant going back to his property, that such notice to the police constitutes an unambiguous revocation of whatever authority the co-tenant possessed. To hold otherwise, would cause police to speculate as what spark may be lit in the future between quarreling couples.

Whether Penney objects at his residence or at the police station is immaterial. Penney objected to the actual officers who conducted the search. What more could he do? To hold otherwise places too much of a burden on a home owner, places too little of a burden on police and ignores the intentions of the true owner who has gone out of his way to voice his objection.

Respectfully, the Sixth Circuit's holding and interpretation of *Georgia v. Randolph*, 547 U.S. 103 (2008) is in direct conflict and should be settled by this Court.

2. Whether the Due Process Clause forbids Penney's 1976 state court judgment to be used as a predicate conviction for 18 U.S.C. § 922(g) because: (A) the Defendant's due process rights pursuant to *Boykin v. Alabama* were violated; (B) the 1976 judgment was never signed by the trial court in violation of Tennessee law; and (C) the obvious errors and inconsistencies in the paperwork that indicate different criminal offenses and different sentences.

Penney was charged in two counts with violating 18 U.S.C. § 922(g)(1) which prohibits "a person convicted in any court of a crime punishable by imprisonment for a term exceeding one year" from possessing a firearm. The term "punishable by imprisonment for a term exceeding one year" is defined in 18 U.S.C. § 921(a)(20) which directs courts to look to state law in determining what constitutes a conviction of a crime. The Sixth Circuit refused to look at Tennessee law.

A. *Boykin* violations.

In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court held that it was impermissible to presume from a silent record that a guilty plea was entered intelligently and voluntarily. *Boykin* was not adopted in Tennessee until 1977. *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977).

While *Boykin* involved the direct appeal of a guilty plea, it's been over 30 years since Penney pled guilty. Once Penney first realized that the Government was attempting to characterize his 1976 conviction as a felony, he sought a state-court remedy, a petition for post-conviction relief in the state courts of Tennessee. Presently, Penney has exhausted his state remedies as his case is procedurally barred by a one year statute of limitations. *Penny v. State*, 2005 WL 3262929 (Tenn.Crim.App. Dec. 2, 2005).

The Sixth Circuit ignored Tennessee law which states that it is the transcript that controls, not the judgment. *State v. Moore*, 814 S.W.2d 381, 383 (Tenn.Crim.App. 1991). In this case, the transcript is truly silent because Penney was never brought before any court. The affidavit from the Official Court Reporter who listened to the tape recording reveals that other defendants appeared before Judge Carden, but not Penney. Notably, Tennessee did not adopt *Boykin* until 1977, one year after Penney pled guilty. *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977).

Even more alarming, the judgment, courtroom minutes, and petition for probation all indicate that Penney pled guilty to different criminal offenses. And, the judgment, which is required to be signed by the presiding Judge pursuant to Tenn.R.Civ.P. 58, is not signed by any Judge.

There is authority that restricts the government's ability to use a conviction as a predicate offense in the event there are *Boykin* violations. *Frazier v. Scroggy*, 833 F.2d 1012, 1987 WL 38964 (6th Cir. (Ky. 1987)); *Roddy v. Black,* 516 F.2d 1380, 1384 (6th Cir. 1975); *Rudolph v. Parke*, 856 F.2d 738, 740 (6th Cir. 1988). The Due Process Clause requires more.

It is a violation of Penney's due process rights for the government to use such a tainted "conviction." Moreover, 660 months of Penney's 895 month sentence is due to his 924(c) convictions which if Penney could lawfully possess a gun, would be a critical element and argument for which Penney was deprived. In other words, if Penney could legally have possessed the numerous firearms, the jury could have considered this factor in determining whether he was guilty of the numerous 924(c) counts of conviction.

In light of the *Boykin* violations, the other errors in the record, and the unsigned judgment, Penney submits that this Court should find as a matter of law that the Due Process Clause bars use of this 1976 conviction. This Court should dismiss these counts and remand this matter back to the Court for a new trial.

B. Irregular Judgment.

The Sixth Circuit found that Penney's 1976 judgment was entitled to a presumption of regularity because it was signed by the clerk of the criminal court. *Penney*, 576 F.3d at 305; *Parke v. Raley*, 506

U.S. 20, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). Penney petitioned for a rehearing *en banc* and cited to Tenn.R.Civ.P. 58, but the Sixth Circuit refused to address this requirement. Again, they ignored Tennessee law.

In Tennessee, *Tennessee Rules of Civil Procedure* 58, which also applies in criminal proceedings, requires judges not clerks to sign judgments. Tenn.R.Civ.P. 58 does not allow a clerk of any court to sign a judgment under any scenario. Tenn.R.Civ.P. 58.

Penney's 1976 judgment was not signed. The presumption of regularity states that the presumption does not attach if a document is not regular on its face and an unsigned judgment is just that, irregular on its face. *United States v. Roses Incorporated,* 706 F.2d 1563, 1567 (Fed.Cir. 1983); *In re Estate of Hall,* 328 F.Supp. 1305, 1308 (D.D.C. 1971).

This Court should find that Penney's 1976 judgment is not entitled to any presumption of regularity.

C. Obvious errors in the Paperwork.

Again, the Sixth Circuit ignored Tennessee law finding that it is the judgment that controls. *Penney*, 576 F.3d at 304-305. In Tennessee, it is the transcript. *McConnel v. Carlton*, 2009 WL 1392544 (Tenn.Crim.App. May 19, 2009); *State v. Thomas*, 1995 WL 676396, 1 (Tenn.Crim.App. 1995); *State v. Moore*, 814 S.W.2d 381, 383 (Tenn.Crim.App. 1991). The Sixth Circuit

also ignored Tenn.R.Civ.P. 58 that requires judges, not clerks, sign judgments. *Penney*, 576 F.3d at 305.

There are a number of inconsistencies and errors in Penney's record which violate the Due Process provisions of the United States Constitution. The unsigned judgment states that Penney was convicted of "attempt to commit a felony." The courtroom minutes from May 19, 1976 indicate that he was convicted of "selling a controlled substance." And the only thing signed to and sworn to in the file, i.e. a Petition for Probation, in which Penney signed before a notary, indicates that he pled guilty to "simple possession of marijuana." Moreover, the records indicate different sentences. The courtroom minutes and Petition for Probation indicate a sentence of 11 months 29 days while the Judgment reflects 5 years suspended on good behavior.

The Sixth Circuit found that these inconsistencies does not put in doubt the "fact" of Penney's felony conviction for the purposes of 922(g). *Penney*, 576 F.3d at 304. But, they do. There's no doubt that he was charged with a crime. There's also no doubt that he was released from custody. Obviously something happened. However, to conclude that factually there was a conviction ignores the most significant piece of the puzzle, the transcript. The fact that Penney was never brought before any judge, asked any question, put under oath or subject to voir dire does raise the issue of what the Due Process Clause requires in order to be a valid conviction.

Given the significant errors in the records, the unsigned judgment, the *Boykin* violation, and the multiple references to 11 months 29 days which is the standard demarcation line for a misdemeanor, Penney submits that this Court should find that Penney was convicted of a misdemeanor. All ambiguities should be strictly construed against the State and resolved in favor of Penney.

3. Whether Penney lost his Second Amendment right to possess a firearm as a result of his 1976 state court conviction because Tennessee law still granted him his Second Amendment right to bear arms.

In Tennessee, prior to May 18, 1981, there were three (3) categories of offenses: misdemeanors, felonies and "infamous" felonies. Infamous crimes did not include the three (3) possible Penney scenarios: simple possession of marijuana, selling a controlled substance or attempting to commit a felony.

Under Tennessee law, there were different punishments for felony offenders and infamous felony offenders. Specifically, at the time of Penney's plea, there were no statutes that prohibited someone convicted of simple possession of marijuana, selling Schedule IV controlled substances or attempting to commit a felony from possessing a firearm. Therefore, as a result of his 1976 conviction, Penney never lost his Second Amendment right to own or possess a firearm.

On May 18, 1981, the Tennessee Legislature passed T.C.A. § 40-20-112 which rendered all felonies infamous. Since May 18, 1981, the Tennessee Supreme Court has held that the expansion of the term "infamous" cannot be expanded and applied retroactively to cases such as Penney's 1976 conviction. *Gaskin v. Collins*, 661 S.W.2d 865 (Tenn. 1983). The Tennessee Attorney General agrees with Penney. It issued a written opinion stating that there is a certain class of felons who were convicted prior to May 18, 1981, who still may possess a firearm. Tenn.Op.Atty.Gen. No. 97-169, 1997 WL 834292, p. 4 (Tenn.A.G.).

Prior to trial, the government conceded this point stating "in the case at bar, the defendant correctly points out that prior to May 18, 1981, only certain felonies rendered a convict infamous. The defendant's conviction for Attempt to Commit a Felony . . . was not an infamous crime at the time he was convicted in 1976." The District Court acknowledged this in its Memorandum and Opinion dated 5/14/04. (Appendix, p. 45).

The Sixth Circuit found it unnecessary to decide if Penney lost his rights to possess a gun after his 1976 conviction citing to *Logan v. United States*, 552 U.S. 23, 128 S.Ct. 475, 169 L.Ed.2d 432 (2007) which held that "the 921(a)(20) exemption provision does not cover the case of an offender who retained civil rights at all times, and whose legal status,

postconviction, remained in all respects unaltered by any state dispensation." *Penney*, 576 F.3d at 306.

The Sixth Circuit also sidestepped the District Court's reasoning that T.C.A. § 39-17-1307(b)(1) which was passed in 1989 was somehow a state law restriction on Penney's right to possess a firearm. Further, the Sixth Circuit sidestepped Penney's Ex Post Facto argument as well. *Penney*, 576 F.3d at 306.

The *Logan* court recognized Penney's situation stating:

> Courts have divided on the question whether § 921(a)(20)'s "unless" clause is triggered whenever state law provides for the continuation of firearm proscriptions, or only when the State provides individual notice to the offender of the firearms disabilities. Compare, *e.g.*, *United States v. Cassidy*, 899 F.2d 543, 549 (C.A.6 1990) (courts must look to "the whole of state law"), with *United States v. Gallaher*, 275 F.3d 784, 791, and n. 3 (C.A.9 2001) (individualized notice is required). We express no opinion on this issue.

Penney's Second Amendment rights were intact at all times. Penney was left in a position where he could lawfully walk out of the courthouse and possess a gun under the laws of the State of Tennessee. He was never advised in open court or given any meaningful Due Process notice that he could not lawfully possess a gun. The Due Process Clause requires more.

Respectfully, this Court should find that the Defendant did not lose his right to a gun following his plea to a non-infamous felony at all relevant times in this case.

4. Whether any law subsequently passed by the Tennessee legislature prohibiting Penney from owning or possessing a firearm amounts to an unconstitutional Ex Post Facto law in violation of the United States Constitution.

First, the Sixth Circuit did not address the issue by finding that *Logan v. United States*, 552 U.S. 23, 128 S.Ct. 475, 479 (2007) barred Penney from possessing a gun. The District Court however found that T.C.A. § 39-17-1351(j)(3) was a state court restriction on Penney's right to possess a gun even though it was passed in 1996, some 20 years after Penney pled guilty. This Court should find that this statute is an unconstitutional Ex Post Facto law as applied to Penney. U.S. Const. Art. 1, § 9, cl. 3.

The District Court found that T.C.A. § 39-17-1351(j)(3) did not amount to further punishment, but was "instead an effort to protect the public." (Memorandum and Order, 5/14/04, p. 18, Appendix, p. 45). The District Court ignored the Second Amendment.

First and foremost, T.C.A. § 39-17-1351 does not apply to Mr. Penney. He was not "rendered infamous" nor was he "deprived of the rights of citizenship by judgment of any state . . . court." Second, this statute

is clearly increasing the Defendant's punishment from his 1976 conviction by depriving Penney of his Second Amendment constitutional right without notice or an opportunity to be heard. *Calder v. Bull*, 3 U.S. 386 (1798). This is *clearly* punishment. Possessing a gun is not just a privilege such as driving one's car. This is a constitutional right.

The fundamental principal is fairness. States cannot charge defendants with crimes, punish them accordingly based upon one set of laws, then be allowed to wait 20 years and strip more rights away under the guise of protecting the public. Respectfully, this Court should find that any law after Penney's plea that affects his ability to own or possess a gun is an unconstitutional Ex Post Facto law.

5. Whether the Fourth Amendment requires that the triggering event in an anticipatory search warrant be expressly contingent that the contraband be on a "sure and irreversible course" to the place to be searched.

In *United States v. Ricciardelli*, 998 F.2d 8, 12 (1st Cir. 1993), the First Circuit discussed anticipatory search warrants and held that triggering events must be expressly contingent on a contraband's arrival at the place to be searched stating:

> . . . the contraband must be on a sure and irreversible course to its destination, and a

> future search of the destination must be made expressly contingent upon the contraband's arrival there. Under such circumstances, a number of courts have found anticipatory search warrants to be valid. *Id.* at 12-13.

This sure and irreversible course standard requires law enforcement to draft clear and concise triggering events which require that contraband which is often times in travel to make it to the place to be searched. If the contraband does not arrive at the place to be searched, the triggering event does not occur and there is no probable cause to search.

The *Ricciardelli* court also explained that there must be a "tri-cornered nexus" between the criminal offense, the evidence to be seized and the place to be searched. *Id.* The Court stated that the event must be the delivery of the contraband to the place to be searched leaving as little discretion to the investigating agents as possible. *Id.*

This Court should hold that the Fourth Amendment requires such a nexus. This link is imperative and strikes at the heart of anticipatory search warrants. Merely linking Penney, as an individual, with the contraband is insufficient to search his residence. This is a clear violation of the "sure and irreversible course" standard and this Court should find that the Fourth Amendment requires a "sure and irreversible course" standard for anticipatory search warrants.

CONCLUSION

Penney was sentenced to 895 months in large part because of his status as a convicted felon from the 1976 conviction. Whether Penney could lawfully possess guns during his trial was a critical fact that the Government successfully used to convict Penney of three (3) 924(c) convictions which constituted 660 months of his sentence. Both Penney and the Government agreed in the District Court that under Tennessee law, when Penney walked out of the courthouse in 1976, he could legally own and possess a gun. Respectfully, the Due Process Clause and the concept of fundamental fairness should preclude the Government from using a conviction which is so constitutionally deficient. Penney respectfully asks this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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576 F.3d 297

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0276p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, *v.* TERRY EUGENE PENNEY, *Defendant-Appellant.*	No. 05-6821

Appeal from the United States District Court
for the Eastern District of Tennessee of Chattanooga
No. 04-00036 – R. Allan Edgar, District Judge.

Argued: October 24, 2008

Decided and Filed: August 7, 2009

Before: BOGGS, Chief Judge; and
MERRITT and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Bryan H. Hoss, DAVIS & HOSS, Chattanooga, Tennessee, for Appellant. Steven S. Neff, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellee. **ON BRIEF:** Bryan H. Hoss, C. Leland Davis, DAVIS & HOSS,

Chattanooga, Tennessee, for Appellant. Steven S. Neff, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellee.

BOGGS, C.J., delivered the opinion of the court, in which GRIFFIN, J., joined. MERRITT, J. (p. 27), delivered a separate dissenting opinion.

OPINION

BOGGS, Chief Judge. After a jury trial, Defendant-Appellant Terry Eugene Penney ("Penney") was convicted of fifteen violations of federal drug and gun laws and an attempt to kill a federal agent, and sentenced to 895 months of imprisonment. Penney now appeals the district court's denial of his motions to dismiss some of the charges and to suppress evidence, the district court's evidentiary rulings, and the reasonableness of his sentence. Penney also argues that the evidence was insufficient to support the jury verdicts or that some counts should have been merged. We hold that the district court committed no reversible errors and, therefore, affirm.

I

Terry Eugene Penney lived at 10609 Dayton Pike, in Soddy-Daisy, Tennessee, less than three miles away from the Soddy-Daisy Police Department. Penney raised roosters and ran a bar called Penney's Place, both familial activities that Penney has carried

on. For about six years, Penney was in a tempestuous relationship with Devota Bowman, during which Bowman lived with Penney "off and on." Soddy-Daisy police officers were no strangers to Penney's residence, where they were called on the "numerous occasions" when the relationship between Penney and Bowman turned violent. The last of such visits took place on August 2, 2003, when, according to the police report, Penney had "pushed [Bowman] out," and she had left the residence. By August 18, 2003, Bowman had again moved back in with Penney.

On the morning of August 19, 2003, following another quarrel with Penney, a barefoot Bowman hitch-hiked to the Soddy-Daisy police station to file a complaint for assault against Penney. While Bowman was at the station, Penney arrived and demanded that police remove Bowman from his residence. The police arrested Penney for assault and transported him to the Hamilton County Jail. As the police officers worked on Bowman's report, she offered information about narcotics in Penney's house. Detective Mike Sneed requested her consent to search the residence; Bowman agreed and signed a consent form.

Soddy-Daisy officers then accompanied Bowman to the Dayton Pike residence. Bowman led the officers, including Sneed, to the front door, which was locked. Because she did not have a key, Bowman went around to the back door, which she opened without a key. Sneed later learned that only a special "trick" opened the back door. Bowman led the officers around the house, pointing to various items of contraband

and picking up her own clothing and personal items as they walked. Officers uncovered numerous guns, cash, scales, and narcotics, removing some of these items from unlabeled, unlocked containers. Police officers then took their search outside the house, discovering a .22-caliber rifle in a pick-up truck and a shotgun in the chicken house.

The next day, Penney, having been released, went to the Soddy-Daisy police station to inquire about his guns. Sneed explained that the guns were confiscated as a result of a search, to which Bowman consented. Penney informed the police that Bowman did not live with him and had no authority to consent to the search.

Following the search on August 19, 2003, the Soddy-Daisy Police and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") opened an investigation of Penney. During the course of the investigation, police recorded several conversations between Penney and Leonard (a.k.a. Sonny) Stewart, a confidential informant ("CI"). A conversation recorded four months later, on January 3, 2004, revealed that the CI would travel to California to pick up approximately 200 pounds of marijuana, for which Penney would provide two buyers, "Midget" and "Cotton" (a.k.a. William North). On January 12, 2004, in a recorded phone conversation, the CI told Penney that he had returned from his trip and instructed Penney to arrange a meeting with Cotton at Penney's Dayton Pike residence the next day at noon.

Prompted by this conversation, Detective Sneed obtained an anticipatory search warrant for Penney's residence, business, vehicles, and person. The warrant was executable only after Penney met with the CI "to examine and attempt to purchase the narcotics by obtaining funds or promising to obtain funds in the near future in order to complete the transaction." On January 13, 2004, at approximately 12:20 pm, the CI went to Penney's residence, where he found Penney alone without Cotton. In the course of a recorded conversation between the CI and Penney, Cotton telephoned Penney, indicating that he was on his way. The CI left, and made at least three recorded phone calls to Penney to determine whether Cotton had arrived. When Penney finally told the CI to return to the residence, the CI arrived, wired, at approximately 6:15 pm. The CI went inside the residence, met Cotton and Penney, and told Cotton he wanted to see the money. Cotton agreed, stating that he had $35,000 for fifty pounds of marijuana, at $700 per pound; Penney was to receive $100 per pound as the middle-man. Penney remained inside, as the CI and Cotton stepped outside. Cotton showed the CI the money inside Cotton's vehicle. The CI stated that he could see the money, a predetermined statement to indicate to the police that they should execute the warrant.

Soddy-Daisy police, Hamilton County Sheriff's Department, and ATF officers moved to execute the search warrant. All of the officers were wearing dark bulletproof vests with appropriate official insignia on

front and back, identifying them as law enforcement. Some of the officers (the "entry team") knocked on the front door, yelling "Sheriff's Department! Search warrant! Get on the ground!" Other officers, including Sneed, Hamilton County Detective Marty Dunn, and ATF Special Agent Paris Gillette, circled around to the back of the residence, where the vehicle with the money was parked. Sneed testified that as he approached, he saw Cotton and the CI being taken into custody by other officers, and heard activity inside the residence. As Sneed went toward the residence, he heard gunshots. When Sneed approached the back porch, Detective Dunn, who was standing at the back door, told Sneed that Penney had shot him. Penney yelled that he wanted to see a badge, and Dunn threw his badge through the open back door. Sneed also called out to Penney identifying himself, and Penney recognized his voice. Sneed entered the residence with his gun drawn and saw Penney holding a shotgun. Sneed ordered Penney to put down the gun several times, and Penney eventually complied and surrendered the weapon. Detective Dunn and another Hamilton County officer, Mark King, then placed Penney in handcuffs. As a result of the operation, Agent Gillette sustained a serious head wound; Dunn and King were also injured.

The subsequent search turned up $35,000 in Cotton's truck and five weapons inside Penney's residence. No narcotics were found inside Penney's residence.

On February 11, 2004, Penney was indicted for various federal drug and firearm offenses, as well as an attempt to kill a federal agent. A jury convicted Penney of seven counts of drug-related offenses (including possession with intent to distribute, conspiracy and attempt to distribute various large quantities of marijuana and cocaine hydrochloride), two counts of being a felon in possession of firearms, two counts of possession of firearms in furtherance of drug trafficking, one count of possession of a firearm with an obliterated serial number, two counts related to discharging a firearm and an attempt to kill an officer of the United States. The district court sentenced Penney to 895 months in prison. Penney timely appealed.

II

A

Penney was charged with two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), on the basis of his 1976 guilty plea in a Tennessee state court. The district court denied Penney's motion to dismiss the charges and to reconsider, and Penney was convicted of both counts. Penney rests his appeal to these convictions on two alternative theories. First, he claims that his 1976 conviction does not qualify as a predicate offense for § 922(g)(1), for three reasons: his guilty plea was not knowing, voluntary, or intelligent; "obvious errors in the paperwork" indicate that Penney was convicted of

a misdemeanor rather than a felony; and the 1976 judgment is not entitled to a presumption of regularity because it was never signed by the trial court. Alternatively, Penney argues that even if he were convicted of a felony, he cannot be convicted of a violation of § 922(g)(1) because he did not lose his right to possess a firearm under Tennessee law in 1976, and that any law that stripped him of that right after the conviction violates the ex post facto clause.

We review *de novo* a district court's denial of a motion to dismiss an indictment on legal grounds. *United States v. Crayton,* 357 F.3d 560, 564 (6th Cir. 2004). 18 U.S.C. § 922(g)(1) criminalizes the possession of firearms by any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." Federal courts must look to "the law of the state in which a defendant was tried in order to determine whether the defendant was convicted" of such a crime. *United States v. Cassidy,* 899 F.2d 543, 545 (6th Cir. 1990); 18 U.S.C. § 921(a)(20). A "crime punishable by imprisonment for a term exceeding one year" does not include convictions of "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less," or convictions that were "expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not . . . possess . . . firearms." 18 U.S.C.

§ 921(a)(20); *see also United States v. Robinson,* 390 F.3d 853, 879 (6th Cir. 2004).

1

Penney argues that his 1976 state conviction cannot form the basis for charging § 922(g)(1) violations because it was unconstitutionally obtained as a result of a guilty plea that was not knowing, intelligent, or voluntary. Because the state court record is silent with regard to his guilty plea, Penney urges that his plea cannot be presumed intelligent or voluntary under *Boykin v. Alabama,* 395 U.S. 238 (1969). The possibility that the 1976 conviction was constitutionally deficient, however, is immaterial. *See Parke v. Raley,* 506 U.S. 20, 29 (1992) (holding that the *Boykin* "presumption of invalidity" was decided on direct review and cannot be "import[ed]" into the "very different context" of a collateral attack, occurring years after the challenged convictions became final). Addressing a statute analogous to § 922(g)(1), the Supreme Court explained that "federal gun laws . . . focus not on reliability, but on the mere *fact of conviction* . . . in order to keep firearms away from potentially dangerous persons." *Lewis v. United States,* 445 U.S. 55, 67 (1980) (emphasis added). Accordingly, we have held that "proof of a defendant's prior felony convictions is admissible for purposes of proving a § 922(g)(1) violation, even if the prior convictions are constitutionally deficient." *United States v. Steverson,* 230 F.3d 221, 224 (6th Cir. 2000).

Penney contends further that he was convicted of a misdemeanor, not a felony, and that the district court did not adequately account for the numerous errors and inconsistencies in the paperwork in concluding that he was convicted of a felony. Penney was indicted on April 1, 1975 for "feloniously selling a controlled substance." The courtroom minutes for May 19, 1976, indicate that upon Penney's plea, he is found "guilty of Selling A Controlled Substance Schedule IV," and is to serve "a term of 11 months and 29 days at the Hamilton County Penal Farm." The judgment, dated May 19, 1976, states that Penney was charged with feloniously selling a controlled substance, but upon his plea, is adjudged guilty of an "attempt to commit a felony." Penney filed a petition for a suspended sentence, in which he asserted that he pled guilty to "possession of marijuana, a misdemeanor, and was sentenced to the workhouse for a period of Eleven (11) months Twenty-Nine (29) days." Penney's petition was sustained at a June 28, 1976 hearing, and his sentence was reduced to five years of probation. An additional notation was added to the May 19, 1976 judgment form, stating: "6/28/76 Judgment ordered into execution – petition for suspended sentence sustained. . . ."

Penney points to the inconsistency with regard to the nature of the crime to which he pleaded guilty in the May 19, 1976 courtroom minutes ("selling a controlled substance schedule IV") and in the judgment ("attempt to commit a felony"). That inconsistency,

Penney argues, should lead this court to give greater weight to his petition for probation, the only document Penney signed, in determining the nature of his conviction. We find this proposition unconvincing.

The inconsistency does not put in doubt the *fact* of Penney's felony conviction for the purposes of § 922(g)(1) because, first and foremost, "[t]he Court speaks through its judgment," *Chapman v. United States,* 247 F.2d 879, 881 (6th Cir. 1957); *see also United States v. Holloway,* 142 F.3d 437, No. 96-6344, 1998 U.S. App. LEXIS 3939, at *6 n.1 (6th Cir. Mar. 4, 1998) ("[A] court speaks through its judgment, not its minute entries"); *Williams v. Brown,* 921 F.2d 277, No. 90-1034, 1990 U.S. App. LEXIS 21171, at *3 (6th Cir. Dec. 4, 1990) ("Since a court speaks through its orders and judgments, the language in the judgment is controlling."). The judgment states that Penney was convicted of an "attempt to commit a felony," which is a felony under Tennessee law, *Rafferty v. State,* 91 Tenn. 655, 658 (Tenn. 1891), and which was punishable by up to five years' imprisonment under the then-applicable Tennessee law, *Penny v. State,* 2005 WL 3262929, at *4 (Tenn. Crim. App. Dec. 2, 2005) (quoting Tenn. Code Ann. § 39-603 (transferred, § 39-1-501, 1982, repealed 1989)); *see also United States v. Beazley,* 780 F.2d 1023, No. 84-5905, 1985 U.S. App. LEXIS 13896, at *4-5 (6th Cir. 1985) (unpublished table decision) (quoting Tenn. Code Ann. § 39-1-501 and citing *Rafferty,* 91 Tenn. 655). The punishment for an attempt to commit a felony – imprisonment in the penitentiary for not more than five years or in the

workhouse or jail for not more than one year, Tenn. Code Ann. § 39-603 (1975) (repealed 1982) – is also consistent with Penney's original sentence of 11 months and 29 days in a county penal farm.[1] Penney's argument that the judgment is not entitled to a presumption of regularity because the judgment form is not signed by the judge is also misplaced: the form is properly signed by the clerk of the criminal court.

Second, the inconsistency between the judgment and the May 19, 1976 courtroom minutes (identifying "Selling A Controlled Substance Schedule IV" as the crime of conviction) does not erode the determination that Penney was in fact convicted of a felony. Selling a Schedule IV controlled substance was also a felony under then-Tennessee law. Tenn. Code Ann. § 52-1432(a)(1)(D) (1975). Since that felony was punishable by *no less* than two years' imprisonment, *ibid.*, it is unlikely that Penney was convicted of this offense, in view of his original sentence. The most this inconsistency implies is that an attempt to commit a felony was indeed the crime of conviction. In no way does it imply that Penney was actually convicted of possession of marijuana, as stated in his petition for a suspended sentence. The petition is not a

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[1] That Penney's sentence was ultimately probated is of no consequence: state law at the time permitted judges to suspend and probate sentences for felonies if the maximum sentence imposed is ten years or less. *See State v. King*, 603 S.W.2d 721, 725 (Tenn. 1980) (discussing Tenn. Code Ann. § 40-2901 *et seq.* (1975)).

court-generated document and has no independent probative value.[2]

Finally, the alleged inaccuracy or clerical error on the judgment form does not vitiate the "fact" of conviction that is necessary and sufficient to support a conviction under § 922(g)(1). *See Lewis,* 445 U.S. at 67. Indeed, Penney has unsuccessfully attempted to amend the 1976 judgment on grounds of clerical error before a Tennessee appellate court, which rejected the claim, thereby confirming the fact of Penney's felony conviction.[3] *Penny,* 2005 WL 3262929, at *4.

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[2] The petition for probation is of dubious probative value for yet another reason: there is no reference to marijuana as the drug at issue in any court-generated documents, and marijuana could not have been the Schedule IV drug charged in the indictment because it was classified in Schedule VI at the time. *See United States v. Penney,* No. 1:04-cr-036 (memorandum op.) (citing *Smithson v. State,* 509 S.W.2d 526 (Tenn. Crim. App. 1974)).

[3] That court explained:

> The petition for probation is the only document that purports to show the petitioner pled guilty to a misdemeanor, while the other two court documents, the judgment and the minutes, both show he pled guilty to a felony. Under these circumstances, we cannot agree with the petitioner's claim that his petition for probation, drafted by his trial counsel, is the most reliable indicator that a clerical error in the judgment may have existed. In addition, regardless of whether we decide the clerical error existed in either of the remaining two court documents, the judgment or the court minutes, the result is the same, the petitioner is a convicted felon.

(Continued on following page)

3

In the alternative, Penney argues that he cannot be deemed convicted of a crime punishable by at least one year because he never lost his right to own, carry, or possess a gun under Tennessee law. It is undisputed that Penney did not lose his right to possess firearms at the time of his 1976 conviction. However, the district court determined, and the government now argues, that Penney was prohibited from possessing a handgun under Tenn. Code Ann. 37-13-1307(b)(1)(B) as of 1989, and became ineligible to obtain a handgun permit under Tenn. Code. Ann. 39-17-1351 as of 1996. Penney offers a number of arguments as to why the 1989 and 1996 state statutes do not apply to him, and maintains that in any case, these statutes cannot deprive him of the right to possess firearms without violating the ex post facto clause of the Constitution.

We find it unnecessary to decide whether Penney has lost his right to possess firearms under Tennessee laws enacted after he has served his sentence for the 1976 offense. 18 U.S.C. § 921(a)(20) excludes convictions "for which a person has been pardoned or has had civil rights restored," from the category of predicate offenses under § 922(g)(1), "unless such . . . restoration of civil rights expressly provides that the person may not . . . possess . . . firearms." The

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Penny v. State, 2005 WL 3262929, at *4 (Tenn. Crim. App. Dec. 2, 2005).

"unless" clause – and the question of whether a defendant is prohibited from possessing firearms under state law – is only relevant if a defendant's civil rights were *restored. Logan v. United States,* 128 S.Ct. 475, 479 (2007) (holding "that the § 921(a)(20) exemption provision does not cover the case of an offender who retained civil rights at all times, and whose legal status, postconviction, remained in all respects unaltered by any state dispensation").

Penney does not argue that his civil rights were restored. On the contrary, he is emphatic that he never lost his civil rights and therefore had no need to seek restoration of these rights. Appellant's Br. at 30-33. Because the Supreme Court has rejected the argument that "[r]ights retained . . . are functionally equivalent to rights revoked but later restored," *Logan,* 128 S.Ct. at 481, even if Penney retained a right to possess firearms under Tennessee law as he argues, he would still not be exempt from conviction under § 922(g)(1).

B

Prior to trial, Penney moved to suppress the fruits of the August 19, 2003 search pursuant to Bowman's consent, as well as the fruits of the January 13, 2004 search pursuant to an anticipatory search warrant. The magistrate judge, to whom the motions were

referred, recommended denying both motions;[4] the district court adopted the magistrate judge's recommendations over Penney's objections.

"In reviewing a district court's denial of a motion to suppress, this court defers to the district court's findings of fact unless they are clearly erroneous and reviews the district court's legal conclusions *de novo.*" *United States v. Smith,* 510 F.3d 641, 647 (6th Cir. 2007) (citation omitted). We view the evidence "in a light most likely to support the decision of the district court." *Ibid.* (citation omitted). Insofar as the district court relied on the factual findings and legal conclusions of the magistrate judge, the same standard applies to the report and recommendations.

I

"The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." *Georgia v. Randolph,* 547 U.S. 103, 106 (2006) (citing *Illinois v. Rodriguez,* 497 U.S. 177 (1990)). A co-occupant's "common authority" depends not on property rights,

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[4] Magistrate Judge Carter recommended the denial of the motions to suppress with the exception of the firearm found in Penney's pick-up truck, over which the magistrate judge determined Bowman had no actual or apparent authority.

but "on mutual use of the property by persons generally having joint access or control for most purposes." *Rodriguez*, 497 U.S. at 181 (citing *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)). Even if a co-occupant in fact lacks common authority over the premises, a search conducted pursuant to his or her consent will not violate Fourth Amendment guarantees if the police reasonably believed that the co-occupant had such authority. *Rodriguez*, 497 U.S. at 186.

Penney argues that Bowman did not have actual or apparent common authority to consent to the search. He argues that Bowman did not have actual common authority over the searched premises because she was at most an overnight guest, who was stripped even of that status prior to the search, and she did not own or have control over the chicken house or the closed containers that were opened during the search. Moreover, Penney claims, police officers could not reasonably believe Bowman had authority to consent because they received "actual notice" that she did not officially reside with Penney and that her co-occupancy of Penney's residence was terminated either on August 2nd or August 19th, and because she did not have a key to the premises.

We need not decide whether Bowman had actual authority to consent to the search because we find that the district court did not err in its determination

that she had apparent authority to do so.[5] The magistrate judge and the district judge found that the Soddy-Daisy police officers knew the following facts. Bowman and Penney had been involved in an off-and-on relationship for approximately six years. When the relationship was on, Bowman lived with Penney, which the police officers knew from their numerous visits to the Dayton Pike residence on domestic violence calls. When the relationship was off, Bowman would leave Penney's place. During these periods she resided with her mother, whose address she listed on her August 19, 2003 complaint against Penney. The officers' most recent visit to Penney's residence connected to the couple's turbulent relations occurred on August 2, 2003, as a result of which Penney had kicked Bowman out. Detective Sneed testified that he did not think Bowman was staying at Penney's at the conclusion of the August 2, 2003 incident.

On August 19, however, when Bowman arrived at the Soddy-Daisy police station, Bowman told Sneed that although the couple has broken up six months ago, they had now reconciled and that she had moved back in the day before. That morning, in the heat of argument, Penney kicked Bowman out without giving her a chance to collect shoes or her car keys. Bowman then hitched a ride with a passing motorist to the police station.

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[5] The district court did not unambiguously specify on what basis it found Bowman's consent to be valid, stating that she had "actual and/or apparent authority to consent."

Once at the residence with Bowman, officers observed further evidence that she was not a mere overnight guest at Penney's house. Bowman's car was parked outside the residence, consistent with her account of that morning's events. She led officers through the residence and picked up her belongings from drawers, a laundry basket, and the washing machine, which she gathered into "several bags." She showed police officers firearms, most of which were in plain view, and identified particular unlocked, unlabelled containers that she knew held narcotics. Bowman told the police that she fed and took care of the chickens when Penney was not there, that she took care of "things around the house," and that she wrote Penney's checks.

The magistrate judge and the district court determined that, given what Soddy-Daisy officers learned on the morning of August 19 and what they knew about Penney's and Bowman's relationship, it was reasonable for them to believe that Bowman was Penney's girlfriend and co-occupant with common authority over the residence. The magistrate judge also noted that it was reasonable for the police not to investigate whether Bowman's name was on the lease "as it is a reality in today's world that consenting adults often co-habitat [sic] together without benefit of legal formalities – including those formalities relating to the establishment of property interests."

The factual findings relied on by the district court and the magistrate judge are well-supported by the record. We agree that the facts known to

Detective Sneed and other Soddy-Daisy officers warranted men "of reasonable caution in the belief that the consenting party had authority over the premises," *Rodriguez,* 497 U.S. at 188 (internal quotation marks and citation omitted). We have confirmed a number of times that a live-in girlfriend has common authority over the premises wherein she cohabits with a boyfriend. *See, e.g., United States v. Grayer,* 232 F. App'x 446, 449 (6th Cir. 2007); *United States v. Hudson,* 405 F.3d 425, 442 (6th Cir. 2005); *United States v. Gillis,* 358 F.3d 386, 391 (6th Cir. 2004); *United States v. Moore,* 917 F.2d 215, 223 (6th Cir. 1990).

As may be inferred from the facts we confronted in *Gillis,* cohabitation need not be uninterrupted to support a reasonable belief in common authority. 358 F.3d 386. In that case, we held that police reasonably believed a girlfriend had authority to consent to a search of a residence where defendant lived, although she told officers that she had left that residence several months earlier as a result of defendant's physical abuse, did not have all the keys necessary to unlock the residence, and was also staying at another address at the time of the search. *Id.* at 388, 391. We explained that the officers' belief was reasonable because the girlfriend stated that "she continued to reside at both" residences, *id.* at 388, "that she had been at the residence earlier that same morning," and "provided them with detailed information about the premises, including the locations where [defendant] had drugs hidden on the property," *id.* at 391. We conclude that in this case, it was likewise reasonable

for Soddy-Daisy officers to believe that Bowman was a live-in girlfriend, who enjoyed access to the premises for most purposes, even if the relationship was known to be turbulent and the couple did not cohabit uninterruptedly.

The factors emphasized by Penney on appeal do not undermine the district court's determination that police officers reasonably believed in Bowman's authority to consent. Penney argues that police officers received "actual notice" that Bowman had no actual authority because she listed a different address on her complaint form, and that any authority she had was terminated when Penney arrived at the station and demanded that she be removed from his house. The bare fact that Bowman listed her mother's address on her complaint form is not dispositive: the absence of formalized property rights does not automatically translate into the absence of common authority. *See Matlock,* 415 U.S. at 172 n.7. That the police officers did not perceive this fact as "actual notice" that Bowman has no common authority over Penney's residence is understandable, especially in view of their knowledge that Bowman occasionally stayed elsewhere (i.e. her mother's residence).

The second fact – Penney's demand that Bowman be removed from his residence – deserves greater consideration. We recognize that in the abstract, if an occupant with formal authority over the premises takes affirmative and unambiguous action to break relations with a live-in lover and to exclude the latter from the formerly shared dwelling, it may not be

reasonable to believe that the latter retains common authority to consent to a search. However, the reasonableness of police officers' beliefs is evaluated in light of all particular facts known to the officers, not by abstracting from the particulars. And in this situation, the particular facts Soddy-Daisy officers knew about this particular couple supported their belief that Bowman had common authority over the residence. The officers knew of numerous occasions when the couple has quarreled violently and reconciled, and had no reason to think that the quarrel of August 19 was any different. Lovers' quarrels and reconciliations are as much of a "reality in today's world" as is cohabitation without "legal formalities," and the police cannot be faulted for not presuming that a particular quarrel put an end to the couple's relationship and living arrangements.

Penney further points out that Bowman did not have a key to the residence, which should have indicated that she had no access or control over the residence. As the magistrate judge and the district court reasoned, this is hardly surprising in view of the circumstances: Bowman did not have a chance to even collect her shoes, let alone pick up a key.

Finally, Penney argues that the rule formulated in *Georgia v. Randolph* "should be extended" to his case. Appellant's Br. at 48. In *Randolph*, the Supreme Court held that "[t]he co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a *present and objecting co-tenant,* [and] his disputed invitation,

without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." 547 U.S. at 114 (emphasis added). Penney argues that because he was in custody at the same police station when and where Bowman consented to the search, he was effectively "present," and that because the situation was ambiguous, police were required to ask Penney's permission for the search. Appellant's Br. at 48-49. This is not a viable extension of the *Randolph* rule. As we have explained, the *Randolph* court held that when "a potential defendant with self interest in objecting to the search is present and actually objects, then a third party's permission does not suffice for a reasonable search," but when "that potential objector is 'nearby but not invited to take part in the threshold colloquy,' . . . that potential objector 'loses out,' and the search will be deemed valid." *United States v. Ayoub,* 498 F.3d 532, 537 (6th Cir. 2007) (quoting *Randolph,* 547 U.S. at 121).

We also think that Bowman had apparent authority to consent to the search of closed, but unlocked and unmarked containers inside the residence. Police officers reasonably believed that Bowman had access to the containers wherein narcotics were stored: they could not fail to surmise this from her knowledge of where drugs were located, as well as a note they found in the residence, indicating her assistance in Penney's drug deals. The note, written by Bowman to Penney stated: "Howie came by Fri. evening, I gave him enough out of that I found to

make 3 or 4. You can settle up with him." Similarly, Bowman's apparent authority extended to the chicken house, in view of her statement to the police that she helped Penney care for the chickens. In the absence of any indication that Penney expected the containers and the chicken house to be inaccessible to Bowman or sought to make them so, we agree that it was reasonable for the officers to conclude that she had such access for most purposes. Thus, we affirm the district court's denial to suppress the fruits of the August 19, 2003 search executed pursuant to Bowman's consent.

2

With regard to the search conducted on January 13, 2004, Penney argues that the evidence should have been suppressed because first, the triggering event identified in the anticipatory warrant never occurred, and second, there was an insufficient nexus between Penney's residence and the contraband to support probable cause required for an anticipatory warrant.

"An anticipatory search warrant is a search warrant that 'by its terms [takes] effect not upon issuance but at a specified future time.'" *United States v. Miggins,* 302 F.3d 384, 395 (6th Cir. 2002) (quoting *United States v. Jackson,* 55 F.3d 1219, 1223 (6th Cir. 1995)). We have required that "conditions triggering the anticipatory search warrant be 'explicit, clear, and narrowly drawn.'" *Ibid.* (quoting *United*

States v. Ricciardelli, 998 F.2d 8, 12 (1st Cir. 1993)). This requirement notwithstanding, an anticipatory search warrant and its supporting affidavit are not to be read "hypertechnically, but in a commonsense fashion." *Ibid.* (internal quotation marks and citation omitted); *see also United States v. Ventresca,* 380 U.S. 102, 109 (1965).

The search warrant obtained by Detective Sneed authorized the search of Penney's residence, locked containers therein, outhouses and vehicles once "Penney meets with the C.I. to examine and attempts to purchase narcotics by obtaining funds or promising to obtain funds in the near future in order to complete the transaction." Penney argues that this event never occurred because he never "examined" the drugs and never obtained or possessed any of the funds himself. Instead, it was Cotton who obtained the money, which remained inside Cotton's vehicle at all times, the CI (Stewart) who was expected to produce the drugs, and neither the money nor the drugs ever touched Penney's hands or crossed the threshold of his residence.

As the magistrate judge and the district court concluded, Penney advances the kind of hypertechnical interpretation of the search warrant's language that our case law disavows. *See e.g., Miggins,* 302 F.3d at 395-96 (holding that a triggering event requiring "the delivery and acceptance of the package by someone inside the residence" was met when "the package was taken by someone who had been inside the residence just prior to its delivery"). As the police knew from their months-long investigation, Penney's

role in the upcoming transaction was that of a middle-man, who might not be the one actually handing over the money or the narcotics. Instead, Penney was expected to, as he did, bring together a buyer and a seller in an attempt to complete the deal, in the course of which the drugs were promised and funds were produced. All the operative transactions specified in the warrant actually occurred: Penney met with the CI, and an attempt was made to purchase drugs with funds that were actually obtained. While the triggering condition could have been formulated in language more attuned to Penney's known and expected role as a middle-man, we find that under a common-sense reading of the warrant, the triggering condition was met when Penney met with Cotton and the CI, and the CI signaled to the police that the funds to be used for the drug purchase were present.

Second, relying on *United States v. Ricciardelli,* Penney argues that the warrant was unsupported by probable cause because the triggering event did not explicitly link the evidence of a crime to Penney's residence. In *Ricciardelli,* the First Circuit held that anticipatory warrants are valid only when "the contraband [is] on a sure and irreversible course to its destination and a future search of the destination must be made expressly contingent upon the contraband's arrival there." 998 F.2d at 12. In this case, Penney claims, the contraband was not on a "sure and irreversible course" to Penney's residence and the triggering event did not condition the search on the contraband's arrival there.

To establish probable cause necessary for every search warrant, the supporting affidavit must set forth "a nexus between the place to be searched and the evidence sought." *United States v. Carpenter,* 360 F.3d 591, 594 (6th Cir. 2004). "The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238 (1983). Our task as "a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Carpenter,* 360 F.3d at 594 (quoting *Gates,* 462 U.S. at 238-39). We hold that the issuing magistrate in this case had a substantial basis for so concluding.

As the magistrate judge recognized, anticipatory search warrants are typically sought to conduct searches triggered by a police-controlled delivery of contraband when there is little or no evidence connecting the place to be searched with evidence of a crime other than the contraband to be delivered. *See Ricciardelli,* 998 F.2d at 10 ("Anticipatory search warrants are peculiar to property in transit."); *United States v. Prince,* 57 F.3d 1071 (unpublished table decision), No. 94-4118, 1995 U.S. App. LEXIS 14815, *5 (6th Cir. June 13, 1995) (same). In these circumstances, rather than "seek permission to search a house for an item they believe *is already located there,*" police seek permission to search for an item

they believe *will be located there* once specified events occur. *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (emphasis added). The *Ricciardelli* court adopted the "sure and irreversible course" standard to govern a typical anticipatory search warrant: if the contraband to be delivered is the *only* evidence of criminal activity that the police believe will be located in the place to be searched, it is logical to condition the search upon the contraband's arrival at its destination. *See* 998 F.2d at 12.

The present search warrant, however, is not a typical anticipatory warrant contemplated by *Ricciardelli*. The contraband involved in the drug deal arranged by the CI and Penney was not the only evidence connecting Penney's residence to criminal activity. In making his decision with regard to probable cause, the magistrate was entitled to look at the other information regarding prior illicit activity included in the affidavit, *see United States v. Rey*, 923 F.2d 1217, 1220 (6th Cir. 1991),[6] and he was "entitled

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[6] That a magistrate may rely on information in the affidavit other than the facts regarding the anticipated event in the context of an anticipatory search warrant is undisputed. Federal courts, including ours, have relied on such information to uphold a broader scope for the search than would be justified on the basis of the "triggering" controlled delivery alone. *See, e.g., United States v. Rey*, 923 F.2d 1217, 1220 (6th Cir. 1991) (holding that "indications of prior illicit activity," besides the controlled delivery, justified a search beyond "the seizure of the controlled delivery package"); *United States v. Garcia*, 882 F.2d 699, 704 (2d Cir. 1989) (holding that "additional facts in the supporting affidavit gave rise to probable cause to believe that

(Continued on following page)

to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense," *United States v. Williams,* 544 F.3d 683, 687 (6th Cir. 2008) (internal quotation marks and citation omitted). We decline to apply *Ricciardelli*'s "sure and irreversible course" standard to a search warrant supported by a substantially dissimilar – and substantially more informative – affidavit.

Detective Sneed's affidavit contained information about prior illicit activity, which contributed to the probability that evidence of drug-trafficking would be found at Penney's residence. Sneed described the August 19, 2003 search and the evidence recovered as a result thereof, noting that the recovered quantity of marijuana was stored in a manner "indicative of large scale marijuana distribution." The affidavit stated that the police received information that Penney received 100 pounds of marijuana from "[H]ispanic individuals" on September 16, 2003, that a Hispanic individual was arrested with 60 pounds of marijuana and admitted having delivered 100 pounds of the drug to Penney. It further related that on January 3, 2004, a discussion between the CI and Penney took place at the latter's residence, arranging for a delivery of over 100 pounds of marijuana. Finally, in describing the anticipated controlled delivery, the

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the apartment was being used as a storage and distribution center for drugs," authorizing a broader search than may have been justified by the delivery of contraband alone).

affidavit states that "Penny has previously utilized his house and business to transact drug deals, [sic] in the house and business there will be *evidence of this and other drug transactions.*" (emphasis added).

It is evident that the issuing magistrate was presented with facts that indicated Penney's more than casual participation in drug trafficking. We have repeatedly held that an issuing judge is "entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the crime and type of offense." *Williams,* 544 F.3d at 686. On this basis, "we have held that an issuing judge may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking." *Id.* at 687 (collecting cases). While past drug-trafficking activity alone does not make such an inference reasonable, "with *continuing* criminal operations, any issue of staleness [of information regarding past criminal activity], or the lack of a direct known link between the criminal activity and residence, becomes minimal." *United States v. Newton,* 389 F.3d 631, 635-36 (6th Cir. 2004) *vacated in part on other grounds,* 546 U.S. 803 (2005) (emphasis added) (citing *United States v. Greene,* 250 F.3d 471, 481 (6th Cir. 2001)). And in this case, the issuing magistrate was presented with an anticipated event that, if and when it occurred, would show that Penney's participation in drug trafficking was "continuing." As the magistrate judge below noted, a "more immediate temporal context" is precisely what the anticipated drug deal

added to the prior illicit activity recounted in the affidavit.

In sum, although the triggering event did not explicitly require that contraband be delivered to Penney's residence, the issuing magistrate had a substantial basis to conclude that the affidavit established a nexus between on-going drug trafficking and Penney's residence, and that there was a fair probability that evidence of drug trafficking would be found when the triggering event took place. *See also Williams,* 544 F.3d at 687 (holding that "even though no criminal activity or contraband [was] observed" at defendant's residence, evidence of "continuing and related illegal firearm activity," allowed the issuing judge to conclude "that evidence pertaining to the handguns would be found in [defendant's] residence").

C

Next, Penney challenges two of the district court's evidentiary rulings: the exclusion of exculpatory hearsay testimony, and the admission of rebuttal testimony by two government witnesses. We review a district court's evidentiary rulings for abuse of discretion. *United States v. White,* 492 F.3d 380, 398 (6th Cir. 2007). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, when it improperly applies the law, or when it employs an erroneous legal standard." *United States v. Cline,* 362 F.3d 343, 348 (6th Cir. 2004) (citations omitted). "We reverse only where the district court's

erroneous admission of evidence affects a substantial right of the party." *White,* 492 F.3d at 398 (citing Fed. R. Evid. 103(a)).

1

The government filed a motion *in limine* to exclude testimony by Sgt. Van Hinton that, after his arrest, Penney said "you guys don't understand, I thought I was being robbed." Penney argued that this statement was an excited utterance or a present sense impression, and constituted an exception to the hearsay rule under Fed. R. Evid. 803(2) or 803(1), respectively. Fed. R. Evid. 803(2) permits a trial court to admit hearsay statements when they "relat[e] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." We have held this exception requires the moving party to show, *inter alia,* that the statement was "made before there is time to contrive or misrepresent." *United States v. Arnold,* 486 F.3d 177, 184 (6th Cir. 2007) (en banc) (citing *Haggins v. Warden, Fort Pillow State Farm,* 715 F.2d 1050, 1057 (6th Cir. 1983)).

The district court decided not to admit the statement because Penney had time and motive to "contrive or misrepresent." Sgt. Van Hinton testified, and Penney does not dispute, that the statement was made ten to fifteen minutes after the confrontation between Penney and law enforcement was over, and after EMT vehicles arrived at the scene with sirens

blaring. At that point, the district court reasoned, Penney "had to have known . . . that . . . he had shot somebody, and most likely that that was a police officer." The district court did not commit reversible error in concluding that because Penney knew what was at stake at the time he made the statement, the statement was unreliable. We also agree with the district court's determination that the statement could not be admitted as a present sense impression for similar reasons, as it was not made "while the declarant was perceiving the event or condition, or immediately thereafter." Fed. R. Evid. 803(1).[7]

2

Penney's second challenge is to the admission of rebuttal testimony from two fellow jail inmates, John Shropshire and Larry Dickerson. Both men testified that, while in jail, Penney said that he wished he would have killed the police officers he had shot, so that they could not testify against him. The government sought the introduction of this testimony on rebuttal, after Penney had testified, as a prior

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[7] Moreover, we note that the exclusion of this statement was unlikely to have affected Penney's substantial rights because the jury was presented with the same information as was contained in the excluded statement: Penney himself presented his argument that he did not know he was shooting at police officers and that he thought he was being robbed, and Agent Melia testified that Penney told him the same thing when Melia interviewed Penney shortly after his arrest.

inconsistent statement under Fed. R. Evid. 801(d)(1). Penney objected to the admission of this testimony solely on the grounds that it was irrelevant and unduly prejudicial, an argument that he renews on appeal.[8] Penney argues that his state of mind months after the fact is not relevant to "any issue in the case." Appellant's Br. at 53. Insofar as the statements have any probative value, Penney argues, it is substantially outweighed by the prejudicial effect the inflammatory statements had on the jury.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. Unfair prejudice "does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence"; rather, it means the damage that results when the introduction of the evidence "tends to suggest [a] decision on an improper basis." *United States*

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[8] We express no opinion on the question of whether Shropshire's and Dickerson's testimony was properly admitted as a prior inconsistent statement under Fed. R. Evid. 801(d)(1). It appears to us at least questionable whether all the requirements for that exemption from the hearsay rule were satisfied: Penney's statement, to which the two witnesses testified, does not appear to have been "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition," as required by 801(d)(1)(A). Nonetheless, because Penney does not challenge the admissibility of the statement on this basis, and because the statement would likely have been admissible as an admission by a party-opponent under Fed. R. Evid. 801(d)(2), we limit our decision to the question of relevance and prejudice.

v. Caver, 470 F.3d 220, 240 (6th Cir. 2006) (citations omitted, alteration in original). The government argues that the relevance, or the "legitimate probative force," of disputed testimony is two-fold. First, it was relevant to the question of Penney's intent at the time of the offense. And second, it was relevant to Penney's credibility.

We find dubious the proposition that a statement made months after the fact and after Penney became aware of the charges against him was relevant to establishing Penney's intent at the time of the offense. However, we agree with the district court that the statement was relevant to the question of Penney's credibility. The jury had to evaluate Penney's credibility because his testimony – in particular regarding the January 13, 2004 confrontation – conflicted with that of the law enforcement officers. Penney denied saying that he wished he had killed the officers, which was directly contradicted by Shropshire's and Dickerson's testimony; thus, the possibility that Penney lied under oath was relevant to the jury's evaluation of his credibility. The testimony does not tend to suggest a decision on an improper basis; and to the extent that risk was present, Penney had ample opportunity to argue that the statement had no "bearing on his intent at the time of the incident," as the district court observed.

We accord the district court "[b]road discretion . . . in determinations of admissibility based on considerations of relevance and prejudice," and we do not "lightly overrule" those decisions. *United States v.*

White, 563 F.3d 184, 191 (6th Cir. 2009) (quoting *United States v. Wagner,* 382 F.3d 598, 616 (6th Cir. 2004)). Viewing the decision to admit evidence "in the light most favorable to the government by maximizing the probative value of the evidence and minimiz[ing] its potential prejudice," as we must, we conclude that the district court did not abuse its discretion in allowing the witnesses to testify about Penney's prior inconsistent statements.

D

Finally, Penney argues that evidence was insufficient to support his convictions on Counts Six, Twenty, Twenty-One, and Twenty-Two. It appears from the record that Penney did not renew his motion for acquittal after all the evidence was presented. "[W]here, as here, a defendant does not renew his motion for judgment of acquittal for insufficiency of the evidence at the close of all of the proofs, appellate review is limited to determining whether there was a 'manifest miscarriage of justice.'" *United States v. Price,* 134 F.3d 340, 350 (6th Cir. 1998) (citations omitted). "A miscarriage of justice exists when the record is devoid of evidence pointing to guilt." *United States v. Paige,* 470 F.3d 603, 608 (6th Cir. 2006) (internal quotation marks and citation omitted).

First, Penney argues that there was insufficient evidence to convict him of Count Six, possession of a firearm in furtherance of a drug trafficking crime on August 19, 2003, in violation of 18 U.S.C. § 924(c). As

Penney argues, "the possession of a firearm on the same premises as a drug transaction would not, without a showing of a connection between the two, sustain a § 924(c) conviction." *United States v. Mackey,* 265 F.3d 457, 462 (6th Cir. 2001). However, if the firearms are "strategically located so that [they are] quickly and easily available for use," their possession can be deemed "in furtherance of" a drug crime. *Ibid.* (citation omitted). The August 19, 2003 search uncovered firearms placed throughout Penney's residence; at least one shotgun was loaded, and several were next to the $1,300 stash hidden in a bathroom closet. The record is not devoid of evidence to support the conclusion that the firearms were placed strategically and were connected to Penney's drug trafficking.

Second, Penney argues that there was insufficient evidence to convict him of Count Twenty, attempt to kill an officer of the United States, in violation of 18 U.S.C. § 1114. Penney maintains that lighting outside his residence was poor, the blinds on his window were closed, he did not hear or see the law enforcement officers at whom he shot through the closed blinds; all of these factors, Penney argues, make it impossible to establish an intent to kill, amounting to reckless conduct at most. Penney's assertions, however, were contested by the testimony of law enforcement officers, indicating that the officers repeatedly and loudly announced their presence (*e.g.*, Officer King's testimony) and that the entry team's yells could be heard by the officers positioned behind

the residence (*e.g.*, Detective Dunn's testimony). The jury was presented with conflicting evidence, and certainly could have rejected Penney's account and believed the testimony of the other witnesses.

Third, Penney challenges his convictions under Counts Twenty-One, discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii), and Twenty-Three, possessing a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c). Penney does not elaborate why either conviction lacks sufficient evidence, and we deem these claims waived.

In the alternative, Penney claims that these two counts should have been merged, along with Count Twenty (attempted murder), for the purposes of sentencing. He argues that sentences for Counts Twenty-One and Twenty-Three should be merged because both are "924(c) violations stemming from the exact same incident, the exact same set of facts." Appellant's Br. at 56.

We have previously rejected an identical argument on substantially similar facts. *United States v. Nabors*, 901 F.2d 1351 (6th Cir. 1990). In particular, we held that when "two separate predicate offenses for triggering § 924(c)(1) were charged and proven," a defendant may be convicted and sentenced for two separate crimes, even if both offenses were committed in the course of the same event. *Id.* at 1357-58. Here, as in *Nabors*, the two violations of § 924(c)(1) of which Penney is convicted are based on distinct predicate

offenses: attempted murder of a federal agent, and an attempt to possess marijuana with the intent to distribute. Penney's unelaborated claim that Count Twenty should have been merged with Twenty-One and/or Twenty-Three for the purposes of sentencing is precluded by the text of the statute. 18 U.S.C. § 924(c)(1)(D)(ii) ("[N]o term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed."). Therefore, the district court did not commit an error by imposing consecutive sentences for these three crimes.

Lastly, Penney argues that there was insufficient evidence to convict him of Count Twenty-Two. Penney's argument relies on a misstatement of the crime of conviction. He claims that he could not be convicted for "possessing marijuana with the intent to distribute on January 13, 2004," because there was no marijuana in Penney's home on that date. Penney was convicted, however, of aiding and abetting an attempted possession of marijuana, along with Cotton (North). To justify a conviction on this count, the government had to prove "(1) an act by a defendant that contributes to the execution of a crime; and (2) the intent to aid in the crime's commission." *United States v. Gardner*, 488 F.3d 700, 711 (6th Cir. 2007). There was ample evidence presented at trial that

Penney arranged the drug deal between North and the CI.

We conclude that the convictions on all of the disputed counts entailed no manifest miscarriage of justice and do not warrant reversal.

III

Penney's last challenge is to the reasonableness of his sentence. In particular, Penney argues that the 660 months of his 895-month sentence that were based on the three § 924(c) convictions are unreasonable because (1) two of these convictions are based on occurrences of the same day and involved the same gun, (2) the district court did not consider 18 U.S.C. § 3553(a) factors, and (3) this is effectively a life sentence given his age.

The 660 months that Penney emphasizes as unreasonable were imposed pursuant to mandatory minimum sentences and a statutory requirement that the sentences run consecutively to any other terms of imprisonment. 18 U.S.C. § 924(c)(1)(D)(ii). "§ 3553(a) factors do not apply to congressionally mandated sentences." *United States v. Franklin*, 499 F.3d 578, 585 (6th Cir. 2007). The balance of the sentence – 235 months – was imposed for the remaining counts. The sentences for each count ranged from 60 to 235 months and were to run concurrently. The district court properly considered the § 3553(a) factors, insofar as it had discretion in the imposition of the non-statutorily mandated portion of the sentence. In

particular, the district court stated that after careful consideration, it found that the need for deterrence and the protection of the public were the most important factors to consider in sentencing Penney. *See United States v. Mayberry*, 540 F.3d 506, 518 (6th Cir. 2008) ("A judge is not required, however, to expressly state each of these factors at sentencing, so long as his or her opinion reflects a consideration of these factors.") The sentence imposed was within the Guidelines range, and is thus presumptively reasonable on review. *See United States v. Heriot*, 496 F.3d 601, 608 (6th Cir. 2007); *Gall*, 128 S.Ct. at 597. Penney does not provide us with any reason to doubt the presumption, and we conclude that the district court's sentence was reasonable.

IV

For the reasons stated above, we AFFIRM the district court on all issues presented.

DISSENT

MERRITT, Circuit Judge, dissenting. I disagree with the Court's holding that the local Soddy-Daisy police had the authority under the Fourth Amendment to search Penney's home without a warrant on August 19, 2003, because Bowman, as Penney's intermittent, live-in girlfriend, had the "apparent

authority" to consent to the warrantless search. Therefore, I disagree with Section II.B.1 of the Court's opinion. "Apparent authority" is absent because the local police had observed and knew that the girlfriend had just come to the police station that morning where she had stated that Penney had made her leave his house – had actually "thrown her out." They knew that she had no key and that they would, and did, have to break into the house. The record is clear that they also had observed and knew that Penney had followed the girlfriend to the police station and had told the police he had removed her from his home and did not want her staying there any longer. He made a request of the police that she be kept off of his property. All of these facts are clear in the record. The Court does not deny that these are the facts of the case. It does not point to any factual dispute to be resolved concerning these facts.

Based on these undisputed facts, it is beyond me to understand how the girlfriend could have any kind of authority, actual or apparent, from Penney to consent to a search of his home. In my view, the Court has not performed its judicial duties in an impartial manner on this issue and has simply followed its inclination to favor the authority of the police over the liberty of the individual citizen granted by the Fourth Amendment. "The right of the people to be secure in their . . . homes . . . against unreasonable searches and seizures" has been openly abridged. The decision here is simply a backhanded way of repealing the exclusionary rule and extinguishing the

protections of the Fourth Amendment because the law, as written by the Founders, is inconvenient and hinders criminal convictions. What should be an open and shut Fourth Amendment violation is spun as a close case and decided in favor of the police.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-6821

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

TERRY EUGENE PENNEY,
Defendant-Appellant.

Before: BOGGS, Chief Judge; and MERRITT and GRIFFIN, Circuit Judges.

JUDGMENT

(Filed Aug. 7, 2009)

On Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED on all issues presented.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:04-cr-036
	)	*Edgar*
TERRY EUGENE PENNEY, a/k/a TERRY PENNY	)	

MEMORANDUM AND ORDER

I. Introduction

Currently pending before the Court is the motion of defendant, Terry Eugene Penney, [Court File No. 30] for reconsideration of this Court's order [Court File No. 24] denying his motion to dismiss [Court File No. 22] counts 7 and 12 of the February 11, 2004 indictment [Court File No. 13]. In the alternative to reconsideration, defendant asks that his current motion be deemed a new motion to dismiss Counts 7 and 12 of the February 11, 2004 indictment [Court File No. 30].

The United States has filed a response to the defendant's motion to reconsider [Court File No. 39]. Consequently, the defendant's motion to reconsider is now ripe for review.

II. ***Background***

Defendant was indicted on February 11, 2004 [Court File No. 13]. Count 7 of the indictment charged that on or about January 17,2004, the defendant "having been previously convicted of a crime punishable by imprisonment for a term exceeding on year, did knowingly possess in and affecting commerce firearms and ammunition . . . in violation of Title 18, United States Code, Section 922(g)(1)." *Id.* at p. 3. Count 12 of the indictment also charges that on or about August 19, 2003, the defendant, "having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce firearms and ammunition . . . in violation of Title 18, United States Code, Section 922(g)(1)." *Id.* at 5.

In his March 11, 2004 motion to dismiss, defendant sought dismissal of Counts 7 and 12 of the indictment on the ground that he had not been convicted of a felony or offense punishable by imprisonment exceeding one year. [Court File No. 22]. Therefore, defendant argued he was not subject to criminal prosecution/punishment under 18 U.S.C. § 922(g)(1). *Id.*

More specifically, defendant asserted that the predicate offense relied on by the government for purposes of the crimes charged in counts 7 and 12 of the indictment, a 1976 state (Tennessee) charge for feloniously selling a controlled substance, is not a

crime punishable by a term of imprisonment exceeding one year as defined in 18 U.S.C. § 921(a)(20). *Id.* Rather, defendant asserted that in connection with the 1976 state charges he was convicted only of a misdemeanor and sentenced to 11 months and 29 days incarceration, which was suspended on his good behavior. *Id.* at 2.

On March 25, 2004, this Court issued a Memorandum and Order denying defendant's motion to dismiss counts 7 and 12 of the indictment [Court File No. 24]. This Court found that in 1975, defendant was indicted by the State of Tennessee on charges of feloniously selling a controlled substance. In 1976, defendant entered a guilty plea to attempt to commit a felony under Tenn. Code Ann. § 39-603. At that time, Tenn. Code Ann. § 39-603 provided for an alternative sentencing scheme – under that statute, defendant could have been sentenced to up to five years imprisonment in the penitentiary, or he could have received imprisonment in the county jail for not more than one year, and a fine not exceeding five hundred dollars ($500).

This Court noted that a "crime punishable by imprisonment for a term exceeding one year" under 18 U.S.C. § 922(g)(1) is determined by state law. *United States v. Cassidy,* 899 F.2d 543, 546 (6th Cir. 1990). Further, the Court noted that both the Tennessee Supreme Court and the Tennessee Court of Criminal Appeals had concluded that under the law of Tennessee, attempt to commit a felony was a felony even though a defendant could receive either a felony

or misdemeanor sentence. *Rafferty v. State,* 16 S.W. 728 (Tenn. 1891); *State v. Seltzer,* 1987 WL 4867 (Tenn. Ct. App. May 27, 1987). The Court further noted that the U.S. Court of Appeals had reached the identical conclusion in an unpublished opinion. *United States v. Beazley*, 1985 WL 13961 (6th Cir. Nov. 7, 1985). Consequently, the Court denied defendant's motion to dismiss counts 7 and 12 of the indictment against him. [Court File No. 22].

III. <u>Defendant's Motion to Reconsider, or in the Alternative, New Motion to Dismiss</u> [Court File No. 30].

In his motion to reconsider/new motion to dismiss, defendant asserts in pertinent part that:

> 5. The Defendant would show that he did not plead guilty to attempting to commit a felony. The Courtroom minutes from May 19, 1976, state that he pled guilty to selling a controlled substance, a misdemeanor . . .
>
> 6. In the alternative, this Defendant would show that he alleges new facts, additional grounds, and other arguments in support of his Motion to Dismiss Counts Seven (7) and Twelve (12) . . .

[Court File No. 30, p. 2].

Subsequent to this Court's order denying his motion to dismiss counts 7 and 12 of the indictment, [Court File No. 24] defendant filed his reply to the

government's response to his motion to dismiss. [Court File No. 25]. Attached to defendant's reply brief are the courtroom minutes from the May 19, 1976 term of the Hamilton County Criminal Court, Division 1 [Court File No. 25, Exhibit A]. The courtroom minutes state in relevant part:

> 130199 State v. Terry Penney – Fel. Selling Controlled Substance
>
> Came the Attorney General and the defendant in person with his attorney, Mr. Buck Dietzen, and this case came on for hearing before the Court without a jury on defendant's plea of guilty.
>
> Upon defendant's plea and upon proof heard, ***it is adjudged by the Court that the defendant is guilty of Selling A Controlled Substance Schedule IV, and it is the judgment of the Court that the defendant serve a term of XI months and 29 days at the Hamilton County Penal Farm,*** and pay all costs. Execution will issue against the defendant for the costs.
>
> Execution of the judgement is further ordered withheld pending an investigation by the State Parole Office. Defendant is allowed 10 days within which to file a Petition for Suspended Sentence to be heard on June 28, 1976. No bond allowed.

130200 State v. Terry Penney – Fel. Selling Controlled Substance

Came the defendant in person with his attorney, Mr. Buck Dietzen, and the Attorney General, by leave and agreement, enters a nolle prosequi in the above case.

Hamilton County will pay the costs of this case when properly taxed and certified.

[Court File No. 25, Exhibit A, p, 18] (emphasis added).

The courtroom minutes from the June 28, 1976 term of the Hamilton County Criminal Court, Division 1 are also attached to defendant's reply brief These courtroom minutes state in relevant part:

130199 State v. Terry Penney – Fel. Selling Controlled Substance

The above case came on for hearing on a Petition For Suspended Sentence heretofore filed by Mr. Buck Dietzen, and the Court, after hearing said petition, is of the opinion same is a proper case for the suspension of the sentence.

Said petition is, therefore, sustained and the sentence hereby suspended upon payment of the costs on or before July 9, 1976, and further conditioned, upon the defendants' good behavior for a period of 5 years, under the supervision of the State Parole Office.

[Court File No. 25, Exhibit A, p. 513].

Attached to defendant's motion to dismiss is the May 19, 1976 judgment of the First Division of the Hamilton County Criminal Court in Case No. 130199 [Court File No. 22, Exhibit B]. The judgment states in relevant part that defendant was charged with fel. selling a controlled substance. *Id.* The judgment further states that:

> Came the Attorney-General and the defendant in person, with his attorney, Mr. Buck Dietzen . . . Upon Defendant's plea, upon proof heard and arguments of counsel, is it therefore adjudged by the Court that defendant is guilty of **ATTEMPT TO COMMIT A FELONY** and it is the judgment of the Court that defendant be confined in the Penal Farm of Hamilton County for a term of 11 months 29 days and pay or secure all costs . . .

Id. A marginal notation on the judgment states: "6/28/76 Judgment ordered into execution – petition for suspended sentence sustained on payment of costs on or before 7/30/76 and good behavior for 5 years under parole supervision." *Id.*

Also attached to defendants motion to dismiss is defendant's petition for probation. [Court File No. 22, Exhibit C]. The petition for probation states in relevant part that:

> That on the 19th Day of May, 1976, the petitioner entered a plea of guilty of possession of marijuana, a misdemeanor, and was sentenced to the workhouse for a period

> of Eleven (11) months Twenty-Nine (29) days. The case was passed for an investigation by the probation officers.

Id. at ¶ 1.

Having reviewed the record, the Court finds that defendant's contention that his conviction in May 1976 for Attempt to Commit a Felony was a misdemeanor is incorrect. First, the Court must rely on state law – in this instance, the law of Tennessee – to determine whether a defendant is subject to a federal firearms disability by virtue of a prior conviction. *United States v. Cassidy,* 899 F.2d 543, 546 (6th Cir. 1990).

Under the applicable law at the time, Tenn. Code Ann. § 39-603, defendant faced a potential prison term of five (5) years in May 1976. It is immaterial that defendant was sentenced to eleven (11) months and twenty-nine (29) days, because even if the sentence received is for less than one year, the conviction does not change from a felony to a misdemeanor. *United States v. Beazley*, 780 F.2d 1023 (Table), 1985 WL 13961 at ** 3 (6th Cir. Nov. 7, 1985).

The Tennessee Courts have long recognized that attempt to commit a felony is a felony charge. *Rafferty v. State,* 16 S.W. 728 (Tenn. 1981); *State v. Seltzer,* 1987 WL 4867 at * 3 (Tenn. Ct. Cr. App. 1987). Further, the Sixth Circuit has held that a conviction under Tennessee's Attempt to Commit a Felony statute qualified as a predicate felony

conviction for federal firearms disability purposes. *Beazley,* 1985 WL 13961 at *2-*3.

Further, defendant's contention that the evidence submitted establishes that he was sentenced only to a misdemeanor is also without merit. The courtroom minutes for May 19, 1976, Hamilton County Criminal Court, Division No. 1, state that "[u]pon [the] defendant's plea and upon proof heard, it is adjudged by the Court that the defendant is guilty *of Selling A Controlled Substance, **Schedule IV*** . . . " [Court File No. 25, Exhibit A].[1]

Defendant argues that the petition for probation filed by his then counsel on June 16, 1976, shows that "on the 19th day of May, 1976, [defendant Penney] entered a plea of guilty of possession of marijuana, a misdemeanor, and was sentenced to the workhouse for a period of Eleven (11) months Twenty-Nine (29) days . . . " [Court File No. 22, Exhibit C, ¶] However, the exhibits submitted by defendant Penney along with his original motion to dismiss [Court File No. 22] and with his reply to the government's response to his

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[1] Apparently no transcript exists of either the May 19, 1976 or June 28, 1976 session in Hamilton County Criminal Court, Division I. On March 31, 2004, counsel for the defendant submitted the March 29, 2004 Affidavit of Abigail M. Pearce, the Official Court Reporter for the Hamilton County Criminal Court, Division I. Ms. Pearce's Affidavit certifies that she "listened to the official audiotapes for court proceedings held on May 19, 1976 and June 28, 1976, before Judge Campbell Carden and have found that there was no recording made relating to case [No. 130199] on either date." [Court File No. 31].

motion to dismiss counts 7 and 12 of the indictment [Court File No. 25], belie the argument that on May 19, 1976 he either pled guilty to simple possession of marijuana or that the fact that he was sentenced to 11 months and 29 days shows that he pled guilty only to a misdemeanor, not a felony.

First, neither the Judgment of Conviction nor the courtroom minutes of May 19, 1976 mention simple possession of marijuana. The Judgment of Conviction of June 28, 1976, states that defendant was found guilty of "ATTEMPT TO COMMIT A FELONY . . ." [Court File No. 22, Exhibit B]. The courtroom minutes for May, 19, 1976, state that based upon the defendant's guilty plea to offense 130199 and the proof heard, Judge Campbell Carden found that defendant was guilty of "Selling A Controlled Substance, Schedule IV . . . " [Court File No. 25, Exhibit A].

Second, Tennessee law, Tenn. Code Ann. § 52-1432 prohibited "(1) the sale and (2) possession with intent to sell a controlled substance in subsection (a) and prohibits the possession of a controlled substance in subsection (b)." *State v. Helton,* 507 S.W.2d 117, 120 (Tenn. 1974). Under section 52-1432, "[a] violation of subsection (a) is a felony. A violation of subsection (b) is a misdemeanor. The offense of possession, prohibited in subsection (b), is a lesser included offense to that prohibited in subsection (a)." *Id.* Further, in order to reduce an action from a felony under section 52-1432 to a misdemeanor,

> [t]he amount of drugs involved alone will not justify the reduction of an offense to mere possession without intent to sell. A casual exchange among individuals of a large amount of drugs will not reduce the offense. In order to reduce the offense to simple possession, it is required by T.C.A. 52 – 1432(a)(2) that there be "a casual exchange among individuals of a small amount of controlled substances . . . "

Loveday v. State, 546 S.W.2d 822, 826 (Tenn. Ct. Cr. App. 1976) (citing *Helton,* S.W.2d at 120).

The May 19, 1976 courtroom minutes reflect that Judge Carden concluded that following the plea, the evidence showed that defendant was guilty of" *Selling* A Controlled Substance, Schedule IV . . . " [Court File No. 25, Exhibit A]. Thus, this offense would not have been the misdemeanor of mere possession of a controlled substance under Tenn. Code Ann. § 52-1432(b), it would have been a felony under § 52-1432(a).

In addition, Judge Carden found that defendant was guilty of "Selling A Controlled Substance, *Schedule IV* . . . [Court File No. 25, Exhibit A]. However, during the relevant time frame, "marijuana [wa]s classified in Schedule VI." *Smithson v. State,* 509 S.W.2d 526, 526 (Tenn. Crim. App. 1974) (citing Tenn. Code Ann. § 52-1422). Thus, the evidence shows that the characterization of defendant's plea in his own June 1976 Petition for Probation is not only not authoritative, but it is also a misstatement. First, the

Petition for Probation is not a court generated document, it was the work product of defendant's own counsel. Second, the Court generated documents in the record, *i.e.*, the May 19, 1976 courtroom minutes and the Judgment of Conviction, flatly contract [sic] defendants characterization of his 1976 conviction as a misdemeanor for the simple possession of marijuana.

Moreover, contrary to defendant's assertion the fact that he received a sentence of eleven (11) months and twenty-nine (29) days incarceration, which was ultimately suspended does not show that defendant's 1976 conviction was a misdemeanor and not a felony. In this instance, pursuant to a plea agreement, defendant Penney pled guilty to Attempt to Commit a Felony. The statutory definition of Attempt to Commit a Felony is:

> Attempt to Commit Felony. If a person attempts to commit a felony or crime punishable by imprisonment in the penitentiary, where punishment is not otherwise prescribed, he shall on conviction be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one year . . .

Beazley, 1985 WL 13961 at ** 2 (citing Tenn. Code Ann. § 39-1-501). At the time of defendant's guilty plea, Tennessee law, Tenn. Code Ann. 40 – 2703 "provide[d] for the commutation of *felony* sentences as follows:

> In no case shall any person convicted of a felony be confined in the penitentiary for less than twelve (12) months. Whenever the minimum punishment is imprisonment in the penitentiary for one (1) year, but in the opinion of the jury the offense merits a less punishment, the jury may punish by confinement in the county jail or workhouse for any period less than twelve (12) months . . . "

State v. Hughes, 512 S.W.2d 552, 553 (Tenn. 1974) (citing Tenn. Code Ann. § 40 – 2703). Moreover, the Court in *Hughes* noted that it had been "uniformly held that in all cases where the punishment prescribed by law is as low as 12 months in the penitentiary, the jury may punish by confinement in the county jail for any period of time short of twelve months." *Id.* (citing *Jenkins v. State,* 163 Tenn. 635, 45 S.W.2d 531 (1931)).

In 1976, defendant Penney entered a guilty plea, thus, the judge was the trier-of-fact for sentencing purposes in lieu of a jury. Accordingly, Hamilton County Criminal Court Judge Carden had the discretionary authority to commute defendant's felony sentence for Attempt to Commit a Felony.

Further, Tenn. Code Ann. § 40-21-101 provided in relevant part:

> Whenever any person has been found guilty of a crime upon a verdict or a plea of guilty, all trial judges in the state having criminal jurisdiction are authorized and empowered

> to suspend the execution of sentence and place the defendant on probation, subject to such conditions as the trial judge may deem fit and proper . . . As used in this chapter, the word "defendant" means any person convicted of a misdemeanor or convicted of any felony, the maximum sentence for which has been fixed by a jury or by a judge as confinement in the state penitentiary for a period of ten (10) years or less, except in cases in which the defendant has been convicted of murder in the first degree, murder in the second degree, rape, unlawful carnal knowledge of a female under the age of twelve (12) years, robbery accomplished by the use of a deadly weapon, a second or subsequent violation of §§ 39-3-401, 39-3-402, 39-3-403, or 39-3-404, violation of § 39-6-471(a)(A) or (B), and in all other cases for which the minimum sentence provided by law is ten (10) years or more; and except in those cases in which the defendant has been convicted of two (2) or more felonies for which the maximum sentence provided by law exceeds ten (10) years' confinement in the state penitentiary.

State v. Anthony, 733 S.W.2d 129, 130 (Tenn. Crim. App. 1987) (quoting Tenn. Code Ann. 40-21-101).[2]

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[2] At the time of defendant's 1976 conviction, Tenn. Code Ann. § 40-21-101 was codified at Tenn. Code Ann. §§ 40 – 2901 through 40 – 2909. *See* Tennessee Code Annotated (Official

(Continued on following page)

Thus, contrary to defendant's assertions, neither the fact he was sentenced to eleven (11) months and twenty-nine (29) days incarceration in the county penal farm, nor the fact that this sentence was eventually reduced to five (5) years probation shows that he was convicted of a misdemeanor and not a felony.

Finally, in *United States v. Holloway,* 142 F.3d 437, 1998 WL 109987 (6th Cir. Mar. 4, 1998) (per curiam), the defendant challenged the sentence he received for his conviction of unlawfully possessing firearms in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). *Id.* at ** 1. Specifically, he asserted his prior Tennessee conviction for a felony drug offense was improperly used to increase his sentence because the State Court records failed to establish that he was convicted of a "controlled substance offense" within the meaning of U.S.S.G. § 2K2.1(7). *Id.* The Tennessee judgment revealed that Holloway had been convicted of conspiracy to possess a "Schedule IV drug as prohibited by [Tenn. Code Ann.] Section 39-17-417. *Id.* at **2. Defendant argued, however, that although the judgment referenced Tenn. Code Ann. § 39-17-417, the state court's minute entries did not *Id,* at n.1. He asserted that as there was a discrepancy, the federal courts should rely on the minute entries rather than the judgment to "detèrmine the true

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Edition), volume 7A (2003), p. 365. Tenn. Code Ann. § 40-21-101 was repealed in 1989. *Id.*

nature of his conviction." The Sixth Circuit rejected this arguments [sic] stating that

> [b]ecause a court speaks through its judgment. *Chapman v. United States,* 247 F.2d 879, 881 (6th Cir. 1957), *cert. denied,* 356 U.S. 945, 78 S. Ct. 791, 2 L.Ed.2d 820 (1958), not its minute entries, we reject [defendant's] argument. *See Williams v. Brown,* 921 F.2d 277 (6th Cir. 1990) (unpublished) ("[T]he language in the judgment is controlling.").

Id.

In addition, defendant asserts, relying on *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969), that there is no indication that his state court guilty plea was knowingly and voluntarily made. In *Boykin,* the Supreme Court stated that it would not presume that a guilty plea is voluntarily made from a silent record. *Id.,* 395 U.S. at 242, 855 S. Ct. at 1712.

Attached as Exhibit E to the addendum to the defendant's reply brief to the government's response to his motion to dismiss counts seven (7) and twelve (12) of the indictment is the affidavit of Abigail M. Pearce, the official court reporter for Division I of the Hamilton County Criminal Court. [Court File No. 31, Exhibit E]. In her affidavit, Ms. Pearce states that she has listened to the official audiotapes for May 19, 1976 and June 28, 1976 before Judge Campbell Carden and there is no recording on either date

related to the case of *State of Tennessee v. Penney,* Case No. 130199. *Id.*

In *Parke v. Raley,* 506 U.S. 20, 113 S. Ct. 517, 121 L.Ed.2d 391 (1992), the State of Kentucky charged Raley with being a persistent felony offender, which required that Raley be convicted of a felony after having been convicted of two prior felonies. *Id.*, 506 U.S. at 23, 113 S.Ct. 517, Raley had never challenged the two predicate, prior felony convictions. However, he sought to suppress them in the persistent felony offender proceeding "arguing that they were invalid under *Boykin* because the records did not contain transcripts of the plea proceedings and hence did not affirmatively show that [his] guilty pleas were knowing and voluntary." *Id.*

On appeal, the Sixth Circuit had rejected the burden-shifting scheme used by Kentucky. Under Kentucky's burden shifting scheme, a prior judgment is presumed valid and the defendant may offer rebuttal evidence showing that the conviction was not valid. *Id.,* 506 U.S. at 29, 113 S. Ct. 517. The Sixth Circuit rejected Kentucky's burden shifting scheme in light of *Boykin* on the grounds that if a defendant were unable to offer rebuttal evidence, the Kentucky burden shifting scheme would allow the state "to carry its burden of persuasion upon a 'bare record of a conviction' ". *Id.*

The Supreme Court reversed stating:

> We seen no tension between the Kentucky scheme and *Boykin*. *Boykin* involved direct

review of a conviction allegedly based upon an uninformed guilty plea. [Raley], however, never appealed his earlier convictions. They became final years ago, and he now seeks to revisit the question of their validity in a separate . . . proceeding. To import *Boykin's* presumption of invalidity into this very different context would, in our view, improperly ignore another presumption deeply rooted in our jurisprudence: the "presumption of regularity" that attaches to final judgments, even when the question is waiver of constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 468 (1938) . . . [Raley], by definition, collaterally attacked his previous convictions; he sought to deprive them of their normal force and effect in a proceeding that had no independent purpose other than to overturn the prior judgments. See Black's Law Dictionary 261 (6th ed. 1990) . . .

There is no good reason to suspend the presumption of regularity here. This is not a case in which an extant transcript is suspiciously "silent" on the question whether the defendant waived constitutional rights. Evidently no transcripts or other records . . . exist at all . . . The circumstance of a missing or nonexistent record is, we suspect, not atypical, particularly when the prior conviction is several years old . . . On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the

> unavailability is due to governmental misconduct) that the defendant was not advised of his rights . . .

Id., 506 U.S. at 29-30, 113 S. Ct. 517.

That is the situation here. In this instance, defendant Penney seeks to challenge the validity of a guilty plea in a situation where the State Court judgment is not only "final," but more than a quarter century has elapsed since the judgment became final. Further, Penney seeks a presumption that his state court guilty plea was not knowingly and voluntarily made based upon no allegation other than a transcript of the plea proceeding is unavailable. Under such situation, and in light of *Raley, supra,* the Court sees no reason to presume from the mere unavailability of a transcript of the May 19, 1976 and June 28, 1976 court proceedings, either that defendant was not advised of his rights or that his state court guilty plea was not knowing and voluntary.

Lastly, the defendant asserts that as the result of his 1976 conviction he never lost the right to possess a firearm and, therefore, cannot be a felon in possession for purposes of 18 U.S.C. § 922(g)(1) as charged in counts seven (7) and (12). It [sic] its response, the government concedes that:

> [i]n the case at bar, the defendant correctly points out that prior to May 18, 1981, only certain felonies rendered a convict infamous. The defendant's conviction for Attempt to Commit a Felony (Selling a Schedule IV

> controlled substance) was not an infamous crime at the time he was convicted in 1976.

[Court File No. 39, p. 33].

However, the government correctly points out that this fact is not dispositive of the issue as the defendant had a state law restriction on his ability to carry a firearm at the time of his arrest. The Sixth Circuit has held that

> in cases involving 18 U.S.C. § 922(g)(1), the federal courts should examine state law solely for the purpose of determining whether the state has restored felons to their full civil rights, including allowing them to possess firearms. If so, then the state has effectively vouched for its convicted felons, declaring them free of stigma and worthy of equal treatment by the federal government.

United States v. Driscoll, 970 F.2d 1472, 1480 (6th Cir. 1992), *cert. denied*, 506 U.S. 1083, 113 S. Ct. 1056 (1993)).

Tenn. Code Ann. § 39-17.1307(b)(1) states:

> (b)(1) A person commits an offense who possesses a handgun and:
>
> (A) Has been convicted of a felony involving the use or attempted use of force, violence or a deadly weapon; or
>
> (B) Has been convicted of a felony drug offense.

Tenn. Code Ann. § 39-17-1307.

In *State v. Ferguson,* 106 S.W.3d 665 (Tenn. Ct. App. 2003), the defendant was indicted by the Lawrence County (Tennessee) Grand Jury on two charges, one of which was, possession of a controlled substance (cocaine) for the purpose of resale. *Id.* at 666. Defendant was found guilty of "Attempt to Commit a Felony." *Id.* He was sentenced to two concurrent terms of three years, but was granted six years immediate probation and a $2,500 fine. *Id.*

Once he had paid the fine, defendant petitioned the Lawrence County Circuit Court to restore his citizenship rights and in December 1991, the Court did so. *Id.* Subsequently, Ferguson applied for a handgun permit, indicating on the permit application form that he had not been convicted of a felony. *Id.* Thereafter in May 2001, a judge of the Lawrence County Circuit Court entered a order "clarifying the effect of the 1991 order," which "went on to declare that all of Mr. Ferguson's [Tennessee] constitutional rights, including the right to keep and bear arms had been restored." *Id.*

The Lawrence County District Attorney sought reconsideration of the 2001 order arguing that under Tenn. Code Ann. § 39-17-1307(b)(1)(B), individuals such as Ferguson who had been convicted of a drug felony were prohibited from possessing a firearm. *Id.* At the reconsideration hearing, Ferguson's counsel asserted that his client's conviction for attempt to commit a felony should not be considered a drug conviction because it made no reference to the nature of the felony involved. *Id.* at 666-667. The Lawrence

County Circuit Court trial judge accepted Ferguson's argument.

On appeal, the Tennessee Court of Criminal Appeals reversed stating:

> There is no proof however, that Mr. Ferguson pled guilty to any crime other than attempt to possess a Schedule II substance for purposes of resale. The record contains only speculation that he might have or could have pled to a difference [sic] offense, if the prosecutor had decided to skirt the requirements of the law. We note that if Mr. Ferguson had been prosecuted for a violation of Tenn. Code Ann. § 39-17-1307, he would not have had to prove anything, and the State would have had to prove its case beyond a reasonable doubt. But the burden of proof on a petition to restore citizenship must necessarily fall more heavily on the petitioner. We therefore believe that Mr. Ferguson is not entitled to have his right to keep and bear arms restored.

Id. at 668.

In *State v. Johnson,* 79 S.W.3d 522 (Tenn. 2002), the defendant pled guilty to one count of unlawful possession of a weapon, a class E felony under Tennessee law, and one count of simple possession of marijuana. *Id.* at 525. On appeal to the Supreme Court of Tennessee, Johnson certified the following question of law for appeal under Tenn. R. Crim. P. 37:

> After an individual has had his full rights of citizenship restored pursuant to Tenn. Code Ann. § 40-29-101, *et seq.*, following a conviction of aggravated assault with a deadly weapon, can he be convicted of a violation of Tenn. Code Ann. § 39-17-1307(b)(1)(A) or is he allowed to possess a handgun?

Id.

The Supreme Court of Tennessee specifically held that under Tenn. Code Ann. § 39-17-1307(b)(1)(A) the

> [Tennessee] legislature intended that a person who has been convicted of a felony involving the use or attempted use of force, violence, or a deadly weapon cannot possess a handgun, even were his or her citizenship rights have been restored pursuant to Tenn. Code Ann. § 40-29-101, *et seq.*

Id. at 528. The Tennessee Supreme Court further observed that Tenn. Code Ann. § 39-17-1307(b)(1) "demonstrated the [Tennessee] legislature's clear intent to prohibit convicted violent felons from possessing a handgun . . . " *Id.*

Further, in reaching its conclusion the Tennessee Supreme Court specifically rejected Johnson's argument that Tenn. Code Ann. § 39-17-1308 demonstrated that any restoration of citizenship rights under Tennessee law included the right to possess a handgun. Tenn. Code Ann. § 39-17-1308 states, *inter alia,* that it is a "defense to the application of § 39-17-1307 if the possession of carrying [of a weapon] was

. . . [a]t the person's . . . [p]lace of residence." *Id.* at 527 (citing Tenn. Code Ann. § 39-17-1308(a)(3)(A) (1997 & Supp. 2001). However, the Tennessee Supreme Court noted that Johnson's argument was flawed because Tenn. Code Ann. § 39-17-1308 also expressly stated that "the defenses described in this section are not available to persons described in § 39-17-1307(b)(1)." *Id.* (citing Tenn. Code Ann. § 39-17-1308(b)).

In this instance, the judgment states that defendant Penney was found guilty of Attempt to Commit a Felony. [Court File No. 22, Exhibit B]. However, the courtroom minutes note that the " . . . defendant is guilty of selling a controlled substance schedule IV . . . ," [Court File No. 25, Exhibit A, p. 18].

As the Court noted previously, a "court speaks through its judgment." *Holloway,* 1998 WL 109987 at **2. Consequently, the Court has considered the June 1976 state court judgment in order to determine that defendant pled guilty to an offense which was a felony under state law; namely, attempt to commit a felony. The courtroom minutes, however, clearly shed light on the nature of the felony which defendant Penney attempted to commit, *i.e.*, the felony involved the selling of a schedule IV controlled substance. The Court has considered the courtroom minutes only to the extent that they show that the felony in the 1976 judgment was an offense which involved a controlled substance which was classified as a schedule IV controlled substance. The Court has not, however,

considered the courtroom minutes for the purpose of varying the 1976 state court judgment.

Thus, the Court finds that applying the decisions and rationale of *Ferguson* and *Johnson, supra,* even though defendant Penney's crime was not an "infamous" crime at the time of his guilty plea, at the time of his arrest on the charges pending in counts seven (7) and twelve (12) of the indictment, he was prohibited from possessing a handgun under Tenn. Code Ann. § 37-13-1307(b)(1)(B).[3]

Tenn. Code Ann. § 39-17-1351(b) provides that:

> Except as provided in subsection (r), any resident of Tennessee who has reached twenty-one (21) years of age may apply to the department of safety for a handgun carry permit. If the applicant is not prohibited from purchasing or possessing a firearm in this state pursuant to . . . § 39-17-1307(b) . . . or any other state or federal law and the applicant otherwise meets all of the requirements of this section, the department shall issue a permit to the applicant.

Further, Tenn. Code Ann. § 39-17-1351(j)(3) provides in relevant part:

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[3] Further although *Johnson* addressed Tenn. Code Ann. § 37-17-1307(b)(1)(A) rather than § 37-17-1307(b)(1)(B), in light of the reasoning used by the Supreme Court of Tennessee in *Johnson*, the Court concludes that the holding of that case would apply to Tenn. Code Ann. § 37-17-1307(b)(1)(B) as well.

> (j) The department shall not deny a permit application if:
>
> . . .
>
> > (3) The applicant, who was rendered infamous or deprived of the rights of citizenship by judgment of any state or federal court, has had the applicant's full rights of citizenship duly restored pursuant to procedures set forth within title 40, chapter 29, or other federal or state law, provided, however that the provisions of this subdivision (j)(3) shall not apply to any person who has been convicted of burglary, any felony offense involving violence or use of a firearm or any felony drug offense involving a Schedule I, II, III, IV, or V controlled substance . . .

Tenn. Code Ann. § 39-17-1351(b), (j). Tenn. Code Ann. § 39-17-1351 was enacted by the Tennessee legislature in 1996. Tenn. Code Ann. §§ 39-17-1307, 1308 were enacted in 1989.

Pursuant to 18 U.S.C. § 921(a)(20) there is not a prior "conviction" under 18 U.S.C. § 922(g)(1) if under state law the defendant's rights have been restored "... *unless* such ... restoration of civil rights expressly provides that the person may not ... possess ... firearms." Title 18 U.S.C. § 921(a)(20) (Emphasis added). This is the so called "unless" clause. Thus, although defendant was not prohibited

from possessing a firearm at the time of his guilty plea, at least since 1996 under Tenn. Code Ann. § 39-17-1351, he has been ineligible to obtain a handgun permit because of his 1976 conviction. Therefore, pursuant to *Caron v. United States,* 524 U.S. 308 (1988), the "unless" clause of 18 U.S.C. § 921(a)(20) is activated; and, therefore, defendant may not possess a handgun under federal law.

Moreover, as the Court has explained in detail previously, despite the actual sentence imposed, defendants 1976 conviction was a "crime punishable by imprisonment for a term exceeding one year;" and, thus, defendant is a person who is prohibited from possessing a firearm under 18 U.S.C. § 922(g)(1). *Caron v. United States*, 524 U.S. 308 (1988); *United States v. Campbell,* 256 F.3d 381, 392 (6th Cir. 2001); *United States v. Cassidy,* 809 F.2d 543, 550 (6th Cir. 1990); *United States v. Williams,* 134 F. Supp.2d 851, 852-53 (ED. Mich. 2001), *aff'd, United States v. Williams*, No. 02-1663, 2003 WL 2217520 (6th Cir. Sept. 18, 2003).

Further, the Court finds that application of Tenn. Code Ann. § 39-17-1351(j)(3) is not unconstitutional in light of the Ex Post Facto Clause of the United States Constitution when applied to defendant Penney. As noted previously, it was not until 1996 that defendant Penney's right to possess a firearm was affected by this statute. This subject was discussed by the Sixth Circuit in *United States v. Campbell*, 256 F.3d 381 (6th Cir. 2001), in connection with a similar fact pattern posed by Michigan law.

The Sixth Circuit Court of Appeals observed that the Michigan courts have held that a Michigan statute which is somewhat akin to Tenn. Code Ann.§ 39-17-1351 was not an infliction of further punishment upon those who had prior felony convictions, but was instead an effort to protect the public. *Campbell,* 256 F.3d at 393-94. It was also pointed out that the defendant in *Campbell* was not being sanctioned for any act he performed prior to the enactment of the Michigan statute; rather, what was being sanctioned was the defendant's recent or present act of possession of a firearm. *Id*; see *People v. Tice*, 558 N.W.2d 245, 246-47 (Mich. Ct. App. 1997). Although in *Campbell* the Sixth Circuit based its ultimate decision on another ground, it did observe that it found the aforementioned reasoning "persuasive." *Campbell,* 256 F.3d at 393.

In the instant action, Terry Penney has been indicted in count seven for unlawfully possessing a firearm on or about January 17, 2003, and in count twelve for unlawfully possessing a firearm on or about August 19, 2003. He had been prohibited under Tennessee law from possessing a firearm at least since the enactment of Tenn. Code Ann. § 39-17-1351(j)(3). That statute did not provide for nor result in criminal sanctions for anything Mr. Penney had done prior to 1996. Rather, the statute was an exercise of the police power of the State of Tennessee to make Mr. Penney ineligible to possess a firearm, Therefore, the Court finds it is not an *ex post facto* law.

Accordingly, the motion of defendant Terry Penney [Court File No. 30] for reconsideration of this Court's order denying his motion to dismiss counts seven (7) and twelve (12) of the February 11, 2004 indictment is **DENIED**.

SO ORDERED.

ENTER:

/s/ *R. Allan Edgar*
R. ALLAN EDGAR
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 1:04-cr-036
TERRY PENNEY, also known as "Terry Penny," and WILLIAM NORTH, also known as "Cotton"	)	*Edgar*

MEMORANDUM AND ORDER

(Filed Mar. 25, 2004)

Defendant Terry Eugene Penney ("Penney") has moved [Court File No. 22] to dismiss Counts Seven and Twelve of the Indictment, which charges the defendant on different dates with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Penney asserts that the predicate conviction is a misdemeanor, not a felony; therefore, he cannot be convicted under § 922(g)(1).

What constitutes a "crime punishable by imprisonment for a term exceeding one year" under 18 U.S.C. § 922(g)(1) is to be determined in accordance with state law; in this ease, Tennessee law. 18 U.S.C. § 921(20); *United States v. Cassidy*, 899 F.2d 543, 546 (6th Cir. 1990). In 1995, Penney was indicted for feloniously selling a controlled substance. In 1976, he pleaded guilty to attempt to commit a felony, TENN. CODE. ANN. § 39-603, which at that time proscribed attempt to commit a felony and provided for an

alternative sentencing scheme. Penney could have been sentenced to imprisonment in the penitentiary for up to five years, or, in the alternative, he could have received imprisonment in the county jail for not more than one year, and a fine not exceeding five hundred dollars ($500).[1]

The Tennessee Supreme Court in *Rafferty v. State*, 16 S.W. 728 (1891), held that under Tennessee law an attempt to commit a felony is a felony, despite the fact that it was punishable both as a felony and as a misdemeanor.[2] In *State v. Seltzer*, 1987 WL 4867 (May 27, 1987), the Tennessee Court of Criminal Appeals in an unpublished opinion citing *Rafferty* concluded that the crime of attempt to commit a felony was indeed a felony even though the defendant

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[1] Tenn. Code Ann. § 39-603:

> **Assault with intent to commit felony – Attempt to commit felony – Penalty.** – If any person assault another, with intent to commit, or otherwise attempt to commit, any felony or crime punishable by imprisonment in the penitentiary, where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by find [sic] not exceeding five hundred dollars ($500).

(Cum. Supp. 1981).

[2] At that time a felony was an offense punishable by imprisonment in the penitentiary or by the infliction of the death penalty. Misdemeanors were law violations punishable by fine or imprisonment in the county jail. *Rafferty*, 16 S.W. at 728.

might receive the alternative misdemeanor sentence. This same conclusion was reached by the United States Court of Appeals for the Sixth Circuit in another unpublished decision, *United States v. Beazley*, 1985 WL 13961 (Nov. 7, 1985).

It is noteworthy that had Penney's 1976 offense been committed today, the Tennessee law would also clearly classify it as a felony because it would be punishable "by one (1) year or more of confinement." TENN. CODE ANN. § 39-11-110.

In sum, since Penney's 1976 conviction was punishable as a felony under Tennessee law, it was, and is, deemed under Tennessee law to be a felony. It was punishable by imprisonment for a term exceeding one year. Hence, it qualifies as a predicate conviction under 18 U.S.C. § 922(g)(1).

The defendant's motion [Court File No. 22] to dismiss Counts Seven and Twelve of the Indictment is **DENIED.**

SO ORDERED.

ENTER:

/s/ R. Allan Edgar
R. ALLAN EDGAR
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	:	
	:	No. 1:04-cr-036
v.	:	*Edgar*
TERRY EUGENE PENNEY	:	

MEMORANDUM AND ORDER

On March 25, 2004, defendant Terry Eugene Penny filed: (1) a motion to suppress the search of his business, Penney's Place [Court File No. 27]; (2) a motion to suppress the search of his residence at 10609 Dayton Pike, Soddy Daisy, Tennessee pursuant to an anticipatory search warrant [Court File No. 28]; and (3) a motion to suppress the search of his residence after consent to search was given by a third party. [Court File No. 29]. On May 14, 2004, this Court referred defendant's motions to suppress to United States Magistrate Judge William B. Mitchell Carter for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). [Court File No. 43].

Judge Carter has held hearings on defendant's motion to suppress and on September 15, 2004, filed a report and recommendation [Court File No. 53]

concerning defendant's motions to suppress.[1] In this report and recommendation [Court File No. 53], Magistrate Judge Carter recommends: (1) that defendant's motion to suppress the search of his business, Penney's Place, [Court File No. 27] be denied as moot; (2) that defendant's motion to suppress the search of his residence pursuant to an anticipatory search warrant [Court File No. 28] be denied; and (3) the defendant's motion to suppress the search of his residence after consent to search was given by a third party [Court File No. 29] be denied, in part, as to the search of Penney's residence and his chicken house; and granted, in part, as to the search of his pick-up truck, wherein a shotgun was seized.

Subsequently, on October 19, 2004, this Court granted defendant's motion for an extension of time – up to and including October 29, 2004 – to file objections to the magistrate judge's report and recommendation. [Court File No. 26, 27]. Thereafter, on October 29, 2004, defendant Penney timely filed objections to the magistrate judge's report and recommendation. [Court File No. 59].

In his objections to the report and recommendation on his motions to suppress, Penney asserts: (1) the magistrate judge erred in finding that Devota Bowman had actual authority to consent to

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[1] Magistrate Judge Carter held hearings on defendant's motions to suppress on July 26, 2004; July 27, 2004; and September 13, 2004.

the search of Terry Penny's home located at 10609 Dayton Pike on August 19, 2003 [Court File No. 59, pp. 8-16]; (2) the magistrate judge erred in finding that Devota Bowman had actual authority over the containers found inside 10609 Dayton Pike on August 19, 2003 [Court File No. 59, pp. 16-18]; (3) the magistrate judge erred in finding that Devota Bowman had actual authority over the outbuildings – the chicken house – located on Terry Penney's property at 10609 Dayton Pike on August 19, 2003 [Court File No. 59, p. 18]; (4) the magistrate judge erred in finding that Devota Bowman had apparent authority to consent to the search of Terry Penney's home, the closed containers therein and his chicken house on August 19, 2003 [Court File No. 59, pp. 18-24]; and (5) the magistrate judge erred in finding that the triggering event specified in the anticipatory search warrant did occur, which allowed agents to search defendant's home on January 13, 2004. [Court File No. 59, pp. 24-34].

After reviewing the record, the magistrate judge's report and recommendation, the defendant's objections, and the applicable law *de novo*, the Court agrees with the magistrate judge's findings and fact and conclusions of law.

The Court agrees with the magistrate judge's conclusion that Devota Bowman had actual and/or apparent authority to consent to the search of Penney's residence, the closed containers within, and the outbuilding – the chicken house – on August 19, 2003.

A search by the police does not violate the Fourth Amendment to the United States Constitution where "voluntary consent has been obtained, either from the individual whose property is searched . . . or from a third party who possesses common authority over the premises." *Harajli v. Huron Tp.*, 365 F.3d 501, 506 (6th Cir. 2004) (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 111 L.Ed.2d 148 (1990)). Moreover, even if the third party does in fact lack "common authority over the premises," the search will still be valid under the Fourth Amendment where the police "*reasonably believed* that the third party had such authority." *Id.* (quoting *Rodriguez*, 497 U.S. at 181, 110 S. Ct. 2793) (emphasis in original). The actions of the police are evaluated under an objective standard pursuant to which the Court must ask whether the facts available to the officer(s) at the time would " . . . warrant a man of reasonable caution [to believe] that the consenting party had authority over the premises?" *Id.* (quoting *Rodriguez*, 497 U.S. at 188, 110 S. Ct. 2793).

In his objections to the magistrate judge's report and recommendations, Penney relies on both his testimony and Devota Bowman's affidavit as grounds for concluding that the magistrate judge erred in concluding that Bowman had actual or apparent authority over Penney's residence, the containers within, and the outbuilding (chicken house) on August 19, 2003.

With regard to Devota Bowman's affidavit [Suppression Hearing, Defendant's Exhibit 1], the

magistrate judge noted that Devota Bowman's statement that she did not give the Soddy Daisy police permission/consent to search Terry Penney's residence, *id.* at ¶ 5, is contradicted by the form giving consent to search for Penney's residence which she signed at 10:04 A.M. on August 19, 2003. [Suppression Hearing, Government's Exhibit 1]. Furthermore, Devota Bowman's statement that she did not give the Soddy Daisy police consent/permission to search the residence is contradicted by her statement that when she returned to the residence with the police on August 19, 2003, she forced the kitchen door to Penney's residence open. [Suppression Hearing, Defendant's Exhibit A, Bowman Affidavit, ¶¶ 6-7].

Further, with regard to Penney's testimony the magistrate judge had the opportunity to observe Penney's testimony, particularly, his demeanor on the witness stand. The magistrate judge described Penney's testimony, especially Penney's testimony which attempted to minimize his relationship with Devota Bowman and the number of occasions on which she stayed/was present at Penney's residence, as "grossly inconsistent" and "not reliable." [Court File No. 43, p. 17]. Further, the magistrate judge also stated that he placed "no credence" in Penney's testimony. *Id.*

Succinctly summarized, the evidence before the magistrate judge showed that on or about 8:15 A.M. on August 19, 2003, Devota Bowman arrived at the Soddy Daisy Police station and reported she had been assaulted by the defendant at his home at 10609

Dayton Pike, Soddy Daisy, Tennessee. Bowman wore no shoes and had flagged down a passing motorist on Dayton Pike for a ride to the police station.

Bowman and Penney had an off-an-on [sic] relationship for approximately the past six years. Bowman told police that she and Penney had broken up about six months ago, but she had returned to his residence on Sunday, August 17, 2003, and they were attempting to patch things up. At the time Bowman came to the Soddy Daisy police department, the Soddy Daisy police were aware of the tempestuous relationship between Penney and Bowman, having made numerous domestic violence calls involving Penney and Bowman to defendant's residence. The most recent domestic violence call had occurred on August 2, 2003. [Suppression Hearing, Government's Exhibit 18].

Detective Mike Sneed of the Soddy Daisy Police Department testified during the suppression hearing that based upon his knowledge of the domestic violence calls to Penney's residence as well as the information Devota Bowman gave him on August 19, 2003, he believed that Bowman was living at Penney's residence on August 19, 2003.

As requested by Sneed, Bowman gave consent to search the defendant's residence. Bowman did not have a key to Penney's residence. However, once present at the house, she led the police to the back door which she opened without a key and without any

apparent difficulty. Detective Sneed testified that he later learned that there was a trick to opening the back door to Penney's residence without a key, which Bowman knew and used.

Bowman led the officers throughout Penney's residence, pointing out contraband. She pointed out a soda can in the garbage used to smoke narcotics and also showed the police weapons and cash. When asked if there were narcotics in the house, Bowman pulled out a plastic container containing marijuana, which was partially concealed under the dining room table, and asked, "Is this what you're looking for?" The plastic container was unlocked.

As Bowman walked through the house picking up personal items and clothing from dresser drawers, a laundry basket and the washing machine, she continued to point out evidence. She also told Detective Sneed that she fed the defendant's chickens, took care of the house and sometimes wrote checks for the defendant. Bowman cooperated with the police. The only time she became upset was when the police confiscated a jar of moonshine, telling the officers that it was the last jar of moonshine defendant's father had made/distilled before he died.

In *Iron Wing v. United States*, 34 F.3d 662 (8th Cir. 1994), after the defendant's car broke down, the defendant's brother-in-law and sister-in-law agreed to stay at the residence so that they could give the defendant's wife a ride to the community college which all three were attending. *Id.* at 664. The day

they moved in, the defendant went to a bar and began drinking and gambling. *Id.* The defendant returned and began arguing with his wife. *Id.* The defendant's brother-in-law attempted to intervene, but the defendant grabbed a rifle, pointed it at the brother-in-law and began to load it. *Id.* At that point, the defendant's wife jumped out the window and fled, but the defendant pursued her, aimed the loaded rifle at her and fired. *Id.* Fortunately, the gun jammed, but the defendant began beating his wife with the rifle, hard enough to break the stock of the gun. *Id.*

As this was occurring, the defendant's brother-in-law escaped and ran to call the police. *Id.* The police arrived at the defendant's house, knocked at the door and got no answer. *Id.* Just at this point in time, however, defendant's sister-in-law, his wife's sister, pulled up to the home in her car. *Id.* She told police she was living in the house with her sister, but she had no keys. *Id.* She told the police, however, that she had left one of the windows open, and she offered to go into the house through the open window and unlock the door. *Id.* One of the police officers who was present had seen the defendant's sister-in-law at the home on a previous occasion. *Id.* The sister-in-law entered the home and unlocked the door for the police. *Id.* After unlocking the door, she brought the police the defendant's rifle with the broken stock. *Id.*

After he pled guilty to a charge of committing a crime of violence with a dangerous weapon in violation of 18 U.S.C. § 924(c)(1), defendant brought a motion pursuant to 28 U.S.C. § 2255. He asserted

that his trial counsel rendered ineffective assistance of counsel because the rifle should have been suppressed on the ground that the police had no reason to conclude that his sister-in-law had the authority to let them into the defendant's residence. *Id.* at 665. Defendant asserted that had the rifle been suppressed, he would not have pleaded guilty. *Id.* Specifically, Iron Wing argued that "it was unreasonable for the officers to believe that [his sister-in-law] had authority over the premises, since she did not have a key and had to crawl in the window." *Id.* The Eighth Circuit rejected this argument stating:

> Here, [defendant's sister-in-law] was living at the house and she told the police so. She corroborated this statement by her familiarity with the house and the fact that she knew she had left her bedroom window unlocked. The conclusion that [defendant's sister-in-law] had authority to consent to the search was easily . . . reasonable. . . .

Id. (citing *United States v. Brokaw*, 985 F.2d 951, 954 (8th Cir.), *cert. denied*, 510 U.S. 913, 114 S. Ct. 300, 126 L.Ed.2d 249 (1993)).

With regard to this action, the Court concludes that the conclusion that Devota Bowman had authority to consent to the search of Defendant Penney's residence, the unlocked containers located therein, and the outbuilding (chicken house) is even more eminently reasonable that [sic] the conclusion in Iron Wing. In this instance, Devota Bowman arrived at the Soddy Daisy police department at about 8:15 A.M.

on the morning of August 19, 2003. She told police defendant had assaulted her at his residence. She wore no shoes and told police she had flagged down a passing car for a ride to the police station.

Further the police were aware of the relationship between defendant and Devota Bowman, having responded defendant's residence for "numerous" domestic violence calls involving defendant Penney and Bowman. The most recent of these calls was on August 2, 2003. Based upon this Detective Sneed testified he believed that Bowman was living at Penney's residence on August 19, 2003.

Bowman signed a consent to search form and went with the police to defendant's residence. She did not have a key. However, she knew the trick to unlock the back/kitchen door of Penney's residence without a key. Further, in this situation, the fact that Bowman did not have a key is somewhat less suspicious than it might have been in other situations as Bowman, who told police she had been assaulted by defendant, had flagged down a car and arrived at the police station without shoes. This certainly raised an inference that Bowman had fled defendant's residence in a hasty manner and, thus, it would seem quite reasonable to an objective observer that she might have had a key, but had been forced to leave it behind in the residence.

Further, after admitting the police into defendant's residence, Bowman let police through the house, and as she gathered up her belongings from

drawers, a laundry basked [sic] and the washing machine, she pointed out various unlocked containers which held evidence that might interest the police. Further, at the suppression hearings, evidence was presented that, when she was living at defendant's residence, Bowman did have access to his outbuilding/chicken house where she fed Penney's fighting chickens.

Accordingly, defendant's objections to the magistrate judge's conclusion that Bowman had actual and/or apparent authority to consent to the search of defendant's residence, the unlocked containers therein and the outbuilding (chicken house) on August 19, 2003 [Court File No. 59, pp. 8-24] are **OVERRULED**.

Moreover, Penney also objects to the magistrate judge's findings regarding the search of his residence on January 13, 2004, which occurred pursuant to an anticipatory search warrant. Specifically, in his objections to the magistrate judge's report and recommendation, Penney argues that this Court should find that the triggering event in the anticipatory search warrant never occurred. [Court File No. 59, pp. 24-27]. As Penney notes in his objection, the triggering event in the anticipatory search warrant is set forth as follows:

> Penney meets with the [confidential informant] and attempts to purchase the narcotics by obtaining funds or promising to obtain funds in the near future in order to complete the transaction.

[Court File No. 59, p. 25]. In essence, Penney contends that because it was William North, not Penney, who actually went outside of Penney's residence to show the confidential informant the money, *i.e.*, the funds to purchase or complete the transaction to purchase the contraband (marijuana), the triggering event set forth in the anticipatory search warrant never occurred.

Here, the Court agrees that Penney is simply trying to impose a hypertechnical, as opposed to a commonsense, interpretation of the triggering event as set forth in the anticipatory search warrant. The Sixth Circuit has stated that an anticipatory search warrant should be "explicit, clear, and narrowly drawn," but that the warrant, and its supporting documents, should not be read hypertechnically, but in a "commonsense fashion." *United States v. Miggins*, 302 F.3d 384, 395 (6th Cir.), *cert. denied*, 537 U.S. 1097, 123 S. Ct. 712, 154 L.Ed.2d 648 (2002), and, *cert. denied*, 537 U.S. 1130, 123 S. Ct. 909, 154 L.Ed.2d 817 (2003), and, *cert. denied*, 538 U.S. 971, 123 S. Ct. 1772, 155 L.Ed.2d 531 (2003). In this instance, although Penney did remain in his residence while North and the confidential informant went outside to North's vehicle, which was parked in Penny's driveway; it was Penney who brought the buyer, with the money, and the confidential informant together at his residence, where Penney, North and the confidential informant met to complete the deal.

Penney also argues that warrant fails to establish a sufficient nexus between the contraband and

the place to be searched is also without merit. Anticipatory search warrants are generally used in controlled deliveries. However, in this instance, the police/agents did not intercept a package of contraband which was addressed to Penny's residence. Rather the agents had been conducting into an investigation into Penney's drug trafficking activities for some months preceding the anticipatory search warrant. The affidavit supporting the anticipatory search warrant sets forth this evidence and establishes the requisite nexus between the contraband and Penney's residence.[2]

Accordingly, defendant's objections to the magistrate judge's conclusions concerning the affidavit supporting the anticipatory search warrant and the search of his residence pursuant to the anticipatory search warrant on January 13, 2004 [Court File No. 59, pp. 24-35] are **OVERRULED**.

For the reasons set forth in detail above, it is hereby **ORDERED** that the Court **ACCEPTS** and **ADOPTS** the magistrate judge's report and recommendation [Court File No: 51] pursuant to 28 U.S.C. § 636(b)(1)(C). Accordingly,

(1) Defendant Penney's motion to suppress the search of his business, Penney's

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[2] This evidence is aptly summarized in the magistrate judge's report and recommendation and the Court sees no need to repeat it here. [Court File No. 43, pp. 27-28].

Place [Court File No. 27] is **DENIED** as **MOOT**;

(2) Defendant Penney's motion to suppress the evidence seized as the result of the search of his residence at 10609 Dayton Pike, Soddy Daisy, Tennessee, on January 13, 2004, pursuant to an anticipatory search warrant [Court File No. 28] is **DENIED**;

(3) That aspect of defendant Penney's motion to suppress the search of his residence on August 19, 2003, after consent to search was given by a third party [Court File No. 29] which seeks to suppress the evidence seized as the result of the search of Penney's residence at 10609 Dayton Pike, Soddy Daisy, Tennessee; the closed containers located therein; and the outbuilding (chicken house) located on the property is **DENIED**; and,

(4) That aspect of defendant Penney's motion to suppress the search of his residence on August 19, 2003, after consent to search was given by a third party [Court File No. 29] which seeks to suppress the evidence seized as the result of the search of Penney's pick-up truck is **GRANTED**.

SO ORDERED.

ENTER this *9th day of November, 2004.*

/s/ R. Allan Edgar
R. ALLAN EDGAR
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	1:04-CR-36
vs.	)	EDGAR/CARTER
TERRY EUGENE PENNEY	)	

REPORT AND RECOMMENDATION

I. Introduction

Defendant Terry Eugene Penney's Motions to Suppress (Court File Nos. 27, 28 & 29) are before the undersigned having been referred by the District Court for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Defendant challenges the search of his home at 10609 Dayton Pike, Soddy Daisy, Tennessee, made after consent to search was given by a third party. (Court File No. 29). Defendant also challenges a second search of 10609 Dayton Pike, Soddy Daisy, Tennessee, pursuant to an anticipatory search warrant on the grounds that the triggering event set forth in the warrant never occurred and that the search warrant affidavit failed to establish a nexus between evidence of a crime and the place to be searched. (Court File No. 28). For the reasons stated herein, it is RECOMMENDED that these motions to suppress evidence be DENIED. Defendant's remaining motion seeks suppression of evidence found in his business, Penney's Place. (Court File No. 27). However, at an evidentiary hearing held on July 26 and 27, 2004, the government averred it will not be

using any evidence discovered at Penny's Place at trial against the defendant. Therefore, it is RECOMMENDED this motion to suppress be DENIED as MOOT.

II. Relevant Facts

An evidentiary hearing was held on Monday, July 26, 2004, and continued on Tuesday, July 27, 2004. Detective Mike Sneed of the Soddy Daisy Police Department, Special Agents, Paris Gillette and Neil Harper with the Bureau of Alcohol, Tobacco, and Firearms (ATF), Special Agent Josh Melton of the Tennessee Alcoholic Beverage Commission, Devota Bowman, and defendant Terry Penney all testified. A supplemental hearing on defendant's motion to suppress was held on September 13, 2004, during which attorney Larry Roddy, Special Agent Paris Gillette, Det. Mike Sneed, and Tennessee Bureau of Investigation Marty Corbitt testified.

A. Detective Mike Sneed

1. The August 19, 2003, Search

Detective Mike Sneed testified to the following: He has been employed with the Soddy Daisy Police Department since January of 1991. At 8:15 a.m. on August 19, 2003, he was at the Soddy Daisy Police Station when Devota Bowman arrived and reported she had been assaulted by the defendant while at his home at 10609 Dayton Pike, Soddy Daisy, Tennessee. She wore no shoes and reported she had flagged

someone down on Dayton Pike to take her to the police station. Sneed called for another officer to take the initial report. Bowman completed an affidavit of complaint at that time and listed her address as 8671 Box 104, Graysville, Tennessee, with a telephone number of 554-3363. Shortly after Devota Bowman arrived at the police station, Terry Penney arrived also. He stated he was there to request that police remove Devota Bowman from his house if she should reappear. Penney was arrested for assault on Devota Bowman at that time and transported to the Hamilton County Jail.

Thirty to forty minutes after the other officer began to take Bowman's report, he returned to tell Sneed that Bowman was giving information about narcotics in Penny's house. Sneed then spoke with Bowman. Bowan [sic] told Sneed, "I'm sure if you look you will find what you're looking for." Bowman reported to Sneed that she had lived with Terry Penney at his Dayton Pike address off and on for the past six years. She further told him that they had broken up about six months ago, but she had returned to the Dayton Pike address on Sunday, August 17, 2003, and they were attempting to work out their problems and get back together. Sneed testified that on August 19, 2003, at the time Bowman came in to make her complaint against Penney, he was aware that the police had made "numerous" domestic violence calls to the Dayton Pike residence involving Penney and Bowman. According to police records, in the past six years the

police had made five domestic violence calls to the Dayton Pike residence with the most recent occurring on August 2, 2003, in which Penney made a complaint against Bowman for domestic assault. Sneed testified that based on this information and the information Bowman gave him that day, he believed Bowman was living at Penney's house when the altercation occurred.

At Sneed's request, Bowman agreed to give consent to search the Dayton Pike residence. Accordingly, she signed a consent to search form at 10:04 a.m. on August 19, 2003. Sneed, along with other Soddy Daisy Police Officers, transported Devota Bowman back to the Dayton Pike residence where she led them to the front door. The front door was locked, and Bowman did not have a key. She continued around to the back door which she opened without a key and without difficulty. Sneed testified he later learned there was a trick to opening the back door about which Bowman knew and used. Bowman then led the officers through the house, pointing out various items of contraband. She pointed out a soda can in the garbage used to smoke narcotics. Bowman also showed them weapons and cash. In the master bathroom, officers found closets with shelves on which sat weapons and $1,300.00 in cash. Sneed asked her if there were narcotics in the house. She did not reply but walked to the dining room and pulled out a plastic container partially under the dining room table and opened it and said, "Is this what you're looking for?" It contained marijuana. Though the

plastic container had been closed, it was not locked and had no name on it. Officers noticed clothing piled up in the dining room. Bowman began picking up her clothing and personal items as she walked through the house. She gathered clothing from dresser drawers, a laundry basket, and the washing machine. Bowman reported to Sneed that she feeds the defendant's chickens, sometimes writes his checks, and takes care of the house. As she walked through-out the house, Bowman continued to point out evidence. Officers also found several sets of scales including one set of Penn scales in an unlocked wooden box in a closed coat closet in the front hallway. The officers also found a small set of digital scales in a plastic container in a closed dresser drawer in the master bedroom. A Norinco 7.62 scope firearm was found on the floor beside the bed in plain view. Officers also found a metal container on top of the refrigerator with trace amounts of a white powder, a duffel bag in the dining room containing trace amounts of marijuana, and a pistol in a dresser drawer in a second bedroom. None of the containers or bags were locked or had names on them. A .44 caliber revolver and a Smith & Wesson semi-automatic pistol were found in a linen closet of the master bathroom. Police then searched the vehicles outside and recovered a .22 in a pick-up truck and a shotgun in the chicken house. Sneed did not know who owned the truck and testified that Bowman did not claim ownership to the truck. Bowman also made no ownership claims to the chicken house. Police also found in the search a handwritten, undated note from Bowman, in which

Bowman states, "Sorry I missed you" and goes on to explain that she has fed the chickens and taken care of some other errands for him. She also writes that "Howie came by Fri. [sic] evening, [sic] I gave him enough out of that I found to make 3 or 4. You can settle up with him." She closes with, "If you have time and want to you can call me." (See Govt. Exhibit 4). Throughout the search, Bowman was very cooperative leading the officers to various evidence. The only time she seemed at all upset was when police confiscated a jar of moonshine which Bowman said was the last moonshine made by the defendant's father before he died.

Sneed further testified that sometime after August 19, 2003, Soddy Daisy Police Officer Luck had a legal paper which needed to be served on Devota Bowman. Luck telephoned the phone number at the Graysville address given by Ms. Bowman on August 19, 2003, and was told by the person who answered the telephone that Bowman did not live at that address. The individual reported she lived at Penney's address. A month after August 19, 2003, Sneed spoke with Devota Bowman's mother and sister who both said that Devota had lived at defendant's residence on and off for six years. In addition, after the August 19, 2003, search, police instigated an investigation into Penney's activities and employed a CI as part of this investigation. The CI often went to Bowman's residence where, on numerous times, he observed Devota Bowman at the residence. On several occasions, the CI went to the Dayton Pike residence early

in the morning and observed Bowman having just woken up.

On August 20, 2003, defendant Terry Penney voluntarily came to the Soddy Daisy Police Department to ask about his guns and what had occurred at his house the day before. Sneed talked with Penney and told him the guns had been confiscated after obtaining consent to search from Devota Bowman. Defendant asserted that Bowman did not have the right to give consent to search his residence, and denied Bowman lived there. Penney stated that he and Bowman had been together off and on for the last five or six years but that they had broken up last summer and had not seen each other for three or four months until Bowman came to his residence on Sunday, August 17, 2003. He admitted they were trying to get back together and stated Bowman had spent one night with him and had brought a bag of clothes. Penney also admitted he sometimes left Bowman alone in the house when he went to a bar or the store.

2. The January 13, 2004 Search

Following the August 19, 2003, search, the Soddy Daisy Police Department in conjunction with the ATF opened an investigation on defendant. Police used a confidential informant (CI) during the course of the investigation and audio recorded several conversations between the CI and defendant. On January 3, 2004, in a recorded conversation between the CI and defendant, defendant made arrangements for the CI

to go to California and pick up approximately 200 pounds of marijuana. Defendant stated he would provide two buyers, one called "Midget" and another called "Cotton," later identified as William North. "Cotton" was to get 50 pounds for $35,000.00. On January 12, 2004, the CI called defendant Penney on the telephone and the conversation was again recorded. The CI informed Penney that he had returned from his trip and instructed Penney to tell "Cotton" to be at defendant's residence the next day at noon. Penney told the CI to "hurry up." Following this conversation, Sneed obtained an anticipatory search warrant. (*See* Govt. Exhibit 8). The search warrant affidavit provided that the search warrant was to be executed only when the following conditions had been met: "Penney meets with the CI to examine and attempts to purchase the narcotics by obtaining funds or promising to obtain funds in the near future in order to complete the transaction." (Govt. Exhibit 8, search warrant affidavit at p. 3). On January 13, 2004, at approximately 12:20 p.m., the CI went to Penney's residence at 10609 Dayton Pike to deliver the marijuana. Penney was present at the resident [sic] but "Cotton" was not. The conversation between Penney and the CI was recorded. During the course of the conversation, Penney received a telephone call from "Cotton" and Penney's side of the conversation was recorded by the CI's wire. "Cotton" indicated to Penney that he was on his way. Since "Cotton" was not present at Penney's residence, the CI left and, later that afternoon, the CI made at least three recorded telephone calls to Penney at Penney's

residence to determine if "Cotton" had arrived at Penney's residence to buy the marijuana. (*See* Govt. Exhibit 10a). Late that afternoon, Penny finally told the CI to come to his residence. At approximately 6:15 p.m. on January 13, 2004, the CI, wearing a wire, arrived at defendant Penney's house and went inside the residence and met with "Cotton" and Penney. The CI said he wanted to see the money, and "Cotton" agreed. "Cotton" said he had $35,000.00 for 50 pounds at $700.00 per pound. Penney was to get $100.00/pound, as the middle man, for the transaction. While Penney remained in the house, the CI and "Cotton" then walked outside and viewed the money in a red Ford pick-up. The CI then gave the predetermined signal for the officers to move in by stating he could see the money in the truck, a comment the officers could hear on the wire. The officers then executed the anticipatory search warrant and found several firearms in Penny's residence.

B. ATE Special Agent Paris Gillette

Special Agent Paris Gillette testified to the following: he has been an agent with ATE since 1998. He has been investigating the defendant since July 2003. In October 2003, Devota Bowman telephoned Agent Gillette and asked to talk to him. They met at the Northgate Mall parking lot in Hixson, Tennessee. Bowman told Gillette she lived with Penney in his house at 10609 Dayton Pike, she was having problems with him, and she wanted to cooperate in their investigation of him. She offered to wear a wire

to help investigate Penney. Gillette determined that Bowman was under the influence of some intoxicant and told her to think about Penney for a couple of weeks and write down as much as she knew about his drug trafficking activities. The government housed her in a hotel for two weeks after which time she gave ten pages of notes concerning Penney's drug sources and customers to Gillette. Bowman told Gillette that she was present in the house when Penney's drug deals took place, that she assisted him in breaking down marijuana in his bathtub, and that she drove or delivered drugs to Penney's customers. She also told Gillette that in September of 2003, while she was present, a robbery occurred at Penney's house in which 100 pounds of marijuana were taken.

During the course of Agent Gillette's investigation of Penney, from July 2003 to January 2004, the CI met with Penney approximately ten times. On January 3, 2004, in a recorded conversation with Penney, the CI talked with Penney about the CI bringing in a large amount of marijuana for sale to Penney. Penney said he knew he could sell the marijuana quickly and he mentioned "Midget" and "Cotton" as two potential purchasers. On January 12, 2004, the CI telephoned Penney who told him in recorded conversation to "hurry up" because "the customer wants his stuff." The CI told Penney to have "Cotton" at Penney's house the next day. After this conversation, Detective Sneed obtained an anticipatory search warrant. The following day, on January 13, 2004, Penney called the CI and told him "Cotton"

was there and to come over. The CI, "Cotton," and Penney met at Penney's house at 10609 Dayton Pike. The CI was wearing a wire and the conversations were recorded. When the CI and "Cotton" went to the truck to look at the money "Cotton" had brought to purchase the CI's marijuana, the CI indicated that he saw the money, and the search warrant was executed.

C. Tennessee Alcoholic Beverage Commission Special Agent Josh Melton

Josh Melton testified to the following: he is a special agent with the Tennessee Alcoholic Beverage Commission and was assigned to the Drug Task Force in approximately July 2003. On August 19, 2003, Det. Sneed telephoned Melton and told him he had obtained consent from Devota Bowman to search Penney's residence. Melton proceeded to the residence where Bowman let them in the back door since the front door was locked. Bowman walked them through the house showing them guns, drugs, and drug paraphernalia. Bowman told Melton that she had been at Penney's residence a short period of time before that morning, and they were working out their personal problems. Bowman was very cooperative and took the initiative in showing officers where evidence was located. The only time that she objected to any activities of the officers during the search was when they confiscated a jar of moonshine which she said was the last batch made by the defendant's father before defendant's father died.

D. ATF Special Agent Neil Harper

Neil Harper has been a special agent with the ATF since October of 1999. During the execution of the search warrant on January 13, 2004, defendant Terry Penney shot and seriously injured Special Agent Paris Gillette. As a result, Agent Gillette was unable to continue in the investigation, and Agent Harper became involved and participated in interviewing Penney and co-defendant William North, aka "Cotton," shortly after they were taken into custody. During the interview, North told Harper that he had come to Penney's residence to buy marijuana in a deal arranged by Penney. He intended to buy 50 to 100 pounds of pot and had brought $35,000.00 for that purpose. For his role as middle man, Penney was to receive $100.00 per pound.

E. Devota Bowman

While the defendant called Devota Bowman as a witness, she testified to very little as she invoked her Fifth Amendment right against self-incrimination. Devota Bowman did acknowledge; however, that it was her signature on the affidavit of complaint (Defendant's Exhibit 1) prepared on August 19, 2003, at the Soddy Daisy Police Station after she and defendant had an altercation. Bowman gives her address in this affidavit of complaint as HC 71 Box 104, Graysville, Tennessee and her telephone number as 554-3363. Furthermore, the 2004 Bledsoe Telephone

Cooperative phone book lists Devota Bowman with the 554-3363 number. (Defendant's Exhibit 7).

Defendant also introduced into evidence several other items showing Bowman's address as HC 71 Box 104, Graysville, TN; namely, a billing statement from Liberty National Insurance Co. dated July 15, 2003, and two letters from attorney Stephen Greer post marked November 12, 2003, and December 3, 2003, respectively. Defendant also introduced a bill from the Bledsoe Telephone Cooperative to Devota Bowman at telephone number 554-3363 for August 1, 2003 to August 30, 2003.

F. Defendant Terry Penney

Terry Penney testified to the following: he has known Devota Bowman, whom he calls Vonnie, for six to seven years. She has been a girlfriend during part of this time. They have experienced periods of intense agreement and intense disagreement. Over the course of the relationship, police have come to his house at 10609 Dayton Pike on domestic violence calls relating to Bowman and Penney at least three times. According to defendant, Bowman lives at her mother's house in Graysville, Tennessee, and her mother lives at another residence with someone else. During the July 27, 2004 evidentiary hearing, Penney first testified that when he and Bowman were together as a couple, Bowman would typically stay at his home two or three days then go to her own home for two or three days. He then admitted that she has

on occasion stayed a week or even two weeks. Then he stated that he didn't remember. According to him, she would stay, they would fight, she would leave. He stated that they went months sometimes when they did not see each other and then months when they did see each other. Penney testified on direct examination that Bowman was not allowed in his house unless he was present. On cross examination, however, Penney testified that he did sometimes leave her alone in the house for short periods when he left for an errand. He also left the house open so she could feed the chickens. She also wrote checks for him.

On or about August 18, 2003, Penney invited Bowman over. She was there one or two nights before the August 19, 2003, search. She brought only an overnight bag. They had an argument early on the morning of August 19, 2003, and Penney "put her out" of the house and told her that when she stopped arguing, he would let her back in. He locked the doors; the windows were already locked. Bowman was clothed but was wearing no shoes. He went to take a shower and when he finished, he found Bowman had left. He then went to the Soddy Daisy Police Department to make a complaint against her and to request that police remove her if she came back to the house. No one asked for Penney's consent to search his house. Instead, he was arrested at the police station and taken to the Hamilton County Jail where he remained until 7 or 8 p.m. that day when he was released and he returned home.

On August 20, 2003, Penney went to the Soddy Daisy Police Department to ask what had happened at his house the day before because he was missing his "stuff" He spoke with Detective Sneed who told him Bowman had given consent to search and he had confiscated Penney's guns. Penney told Sneed Bowman had no right to give consent to search his house. Penney also testified that the back door would open if it was kicked at a certain place on the bottom of the door. Penney surmised that Bowman had probably observed him open the door in that manner and therefore knew how to use this trick. About a month after August 19, 2003, Bowman and Penney began to see each other again, and she sometimes came over to his house. She was at the house in September when Penney was robbed, she sometimes assisted defendant by weighing marijuana, and she made a drug delivery or two to customers. On January 12, 2004, Bowman was present at Penney's home and hit him with a bush axe.

G. Supplemental September 13, 2004, Hearing

The undersigned reopened the suppression hearing on September 13, 2004 at the defendant's request to allow him to present additional evidence. Defendant called attorney Larry Gene Roddy as a witness. Roddy testified that in late August 2003, Penney met with him at his office to engage his services in a domestic violence case in Soddy Daisy City Court. As a result of his conversation with Penney, Roddy instructed Penney to bring Devota

Bowman into to talk with him about the events on August 19, 2003. The next day, Penney and Devota Bowman came in to speak with Roddy. While Roddy could not recall if he spoke to Bowman alone, he testified that it is his usual practice to interview individual persons separately as well as together to insure that each person is acting voluntarily. According to Roddy, he prepared that same day an affidavit for Bowman to sign based on the information she had given him during her interview with him. Roddy testified he reviewed every paragraph of the affidavit with her and asked her if each paragraph was true and accurate, to which Bowman responded that it was. Bowman then signed the affidavit in Roddy's presence and Roddy's wife, a notary, notarized the affidavit. The affidavit is dated August 28, 2003. In the affidavit, Bowman states the following: she was not "living" or "staying" at Penney's house on August 19, 2003, and that she has only one residence – HC 71, Box 104, Graysville, TN. She did not give the Soddy Daisy Police or any one else permission to search Penney's residence on August 19, 2003, and she went to Penney's residence with police on August 19, 2003, to obtain her personal items from Penney's house. The only personal items Bowman had in the house were in a bag sitting next to the entrance at the kitchen door.

At the September 13, 2004, supplemental hearing, Det. Sneed, Agent Mellon, and Agent Gillette simply confirmed much of their testimony given on July 26 and 27, 2004. TBI Special Agent Corbitt, who

had not testified earlier, stated she accompanied officers to Penney's residence on August 19, 2003, to conduct the search. Bowman was very cooperative leading officers throughout the house and pointing out evidence. The only reservations Bowman expressed about the search concerned a bottle of moonshine officers confiscated.

III. Analysis

A. The August 19, 2003, Search

1. Actual Authority

The defendant asserts the August 19, 2003 warrantless search of his residence violated the Fourth Amendment's prohibition of unreasonable searches because Devota Bowman had neither actual nor apparent authority to consent to the search of his house.

Normally, a warrantless search of an individual's residence violates the Fourth Amendment. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Gillis*, 358 F.3d 386, 390 (6th Cir. 2004), *petition for cert. filed*, (Jun. 10, 2004). Such a warrantless search does not, however, violate the Fourth Amendment where voluntary consent is obtained from the individual whose home is searched or from a third party who possesses actual or apparent common authority over the property. *Rodriguez*, 497 U.S. at 181 and 189; *Gillis*, 358 F.3d at 391; *Harajli v. Huron Township*, 365 F.3d 501, 506 (6th Cir. 2004). The government bears the burden to establish actual or apparent common authority. *See id.*

The Supreme Court has defined actual common authority in the following manner:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States. v. Matlock, 415 U.S. 164, 172 (1974) (internal citations omitted).

The undersigned Magistrate Judge concludes Bowman did have common authority to consent to the search of the Dayton Pike residence. Bowman's name was not on the lease for the Dayton Pike residence nor were any of the utilities for that residence in her name. In fact, it appears that Bowman used her mother's residence in Graysville as an alternate residence – a place to go when she and Penney were on the "outs" with one another. It also appears that Bowman may have used her mother's residence on a consistent basis as a place to direct her own mail. Nevertheless, the evidence was also very clear that "on and off" for the past six years, Bowman was more

than a mere visitor in Penney's house. On August 17, 2003, after several months of estrangement, the couple decided to reconcile and Bowman returned to the residence so they could have another go at their relationship. Bowman put clothes in a dresser drawer and had clothes in the washer and a laundry basket, indicating she was settling in. She knew the contents of the house extremely well as she was able to point out to police many items of contraband in areas where a mere guest would not normally have access. She knew what was inside drawers, closets, and various containers. The fact that she did not have a key on August 19, 2003, when she arrived at the police station is of no consequence since she had been forced to leave in a hurry without collecting any of her belongings. The evidence indicates that Bowman and Penney had a long standing pattern over the past five to six years of Bowman residing with Penney for periods of time until they had a blow up when she would leave, probably to the Graysville address, only to return after a cooling off period. Police had been called to the Dayton Pike address on several occasions for domestic violence complaints involving Bowman and Penney. Bowman's mother, sister, and Bowman herself stated that Bowman had lived with Penney off and on for the past five to six years. The events of August 17-19, 2003, were part of this pattern which continued even after the August 19, 2003, event when Bowman moved back into Penney's house a month later. Thereafter, Bowman was seen by the CI on numerous occasions, including in the early morning, at Penney's address. Both before and

after August 19, 2003, Devota Bowman fed his chickens, wrote checks for him, and had access to the house when he was not there. She knew the trick to enter the back door. She ran errands for him and handled business for him when he was out ("Howie came by Fri. [sic] evening, [sic] I gave him enough out of that I found to make 3 or 4. You can settle up with him.") (*See* Govt. Exhibit 4). As further evidence of this pattern of living with Penney, the undersigned notes when Officer Luck phoned the Graysville address to ask for Bowman, the person who answered responded Bowman lived with Penney at the Dayton Pike residence. Furthermore, in October of 2003, Bowman told Special Agent Paris Gillette she was living with Bowman and offered to return to the residence with a wire. Clearly Bowman's and Penney's relationship and corresponding co-habitation turned off and on (like a Bunsen burner), but from August 17-19, 2003, the relationship and their co-habitation was on. Bowman was living with Penney in yet another attempt (inevitably doomed) to resurrect their relationship. The evidence indicates that during this blindly hopeful but most assuredly fleeting period of time, Devota Bowman had joint access to the house at 10609 Dayton Pike for most purposes and thus it is reasonable to recognize that she had the right to permit inspection in her own right and that Penney assumed the risk that she might permit his house to be searched.

I give no credence to Devota Bowman's affidavit prepared and signed on August 28, 2003, and introduced into evidence at the September 13, 2004 supplemental hearing. The affidavit directly contradicts the testimony of four law enforcement officers who testified Bowman consented to the search of Penney's house. It also contradicts the written consent form which Bowman herself signed. The affidavit, which further states that Bowman was not staying at Penney's residence when Bowman went to the Soddy Daisy Police Department "relative to an incident at Terry Penney's residence, approximately three weeks ago," also contradicts Terry Penny's own testimony. Penney testified that Bowman stayed over at his house for two nights before the incident on the morning of August 19, 2003. In short, defendant presented no evidence on September 13, 2004, which alters my findings in this case.

Two more points are worth mentioning in regard to the actual authority issue. First, defendant argued at the July 27, 2003 evidentiary hearing that even if Bowman was residing at Penney's house from August 17, 2003 until the morning of August 19, 2003, Penney put her out that morning before she went to the police station thereby revoking any authority she had to consent to a search of his residence. I note, however, that Penney testified he told Bowman after he "put her out," that if she would stop arguing he would let her back in. Second, I place no credence in Penney's attempt to minimize his and Bowman's relationship. His testimony concerning how long and

how often she stayed at his house was grossly inconsistent and therefore not reliable.

Defendant further argues that even if Bowman had authority to give consent to search the general premises of his house, she did not have authority to consent to the search of certain closed containers; namely, the plastic container with marijuana, the wooden box containing the Penn scales in the coat closet, and the closed case with the other set of scales in a bedroom dresser drawer.

Bowman's actual authority to consent to a search of the general premises at 10609 Dayton Pike does not necessarily mean that she had actual authority to consent to a search of closed containers or enclosed areas within the premises because "[i]t is, of course, conceivable, that family members will exclude from this common authority access to areas where they wish to maintain an expectation of privacy, even from other members of the family." *United States v. Clutter*, 914 F.3d 775, 778 (6th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *see also Gillis*, 358 F.3d at 391. "[C]ourts are understandably reluctant to approve third-party consent searches of an enclosed space in which the family member targeted for the search has clearly manifested an expectation of exclusivity." *Clutter*, 914 F.3d at 778. Courts examine the nature of the container at issue and any steps taken to ensure its privacy when determining if a third party has actual authority to consent to a search. *United States v. Aaron*, 2002 WL 511557 * 4 (6th Cir. Apr. 3, 2002), *cert. denied*, 537 U.S. 872 (2002) (*see also* cases

cited therein). In the instant case, none of the containers at issue were locked or placed in an area which was locked. None were labeled with a name. There was no evidence whatsoever that Penney manifested an expectation of exclusivity as to the enclosed containers at issue. On the contrary, the evidence indicates Bowman did have access to the containers at issue because she helped Penney distribute marijuana to his customers. Thus I conclude Penney also had actual common authority to consent to the search of the closed containers in Penney's residence.

The search of the chicken house and the pick-up truck remain at issue. The evidence indicates that while Bowman lived with the defendant, she had free access to his chicken house where she fed his fighting chickens. Consequently, I conclude she had actual common authority to consent to the search of the chicken house. On the other hand, the evidence indicates Bowman claimed no access or ownership interest to the pick-up truck at issue. Consequently, I conclude she lacked actual common authority to consent to the search of the truck where a shotgun was found.

2. Apparent Authority

Even if Bowman did not have actual authority to consent to the search of defendant's residence and the chicken house, "a warrantless entry is [nevertheless] valid when based upon the consent of a third party

whom the police, at the time of entry, reasonably believe to possess common authority over the premises . . . " *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990). Apparent authority is based upon an objective standard: "would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises? If not, then warrantless entry without further inquiry is unlawful unless actual authority exists." *Rodriguez*, 497 U.S. at 188-89 (internal citations omitted); *see also, Gillis*, 358 F.3d at 3990-91; *Harajli*, 365 F.3d at 506.

The instant case is very similar to *Rhodes v. McDaniel*, 945 F.2d 117, 119 (6th Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992). In *Rhodes*, police received a telephone call from a Sheri Heffington reporting that James West was chasing her around the house with a machete. Police proceeded to the house where they were met by Heffington who escorted them into the living room. The court held Heffington "had apparent authority to consent to the entry, as she had from that address previously contacted police and admitted to residing there on occasion." *Id.*

When Bowman arrived at the Soddy Daisy Police Station early on the morning of August 19, 2003, she reported to Det. Sneed that she and her boyfriend, Terry Penney, had had a fight, he shoved her out of the house, and she, wearing no shoes, had flagged a driver down on Dayton Pike to bring her to the police station. She told Sneed she had lived with Penney on

and off for the past six years and that while they had been apart in the immediate past, they had reconciled and she had returned to his house on August 17, 2003, in yet another attempt to work out their relationship. This statement was consistent with other information Sneed had about the couple; namely, that Bowman would live with Penney for periods of time during which there would be a violent episode followed by a hiatus in the relationship until the next time she returned to reside with Penney. That Bowman had no key to the house is immaterial since Sneed knew she had left in a hurry with no opportunity even to obtain her own car keys. I also do not find it significant that police did not investigate if Bowman's name was on the lease as it is a reality in today's world that consenting adults often co-habitat [sic] together without benefit of legal formalities – including those formalities relating to the establishment of property interests. Finally, I find the reasonableness of Sneed's determination that Bowman had apparent authority to consent to the search is not defeated by Bowman's giving the Graysville address as her address on her affidavit of complaint on August 19, 2003. Bowman reported a violent physical altercation with Penney that morning, and Sneed reasonably concluded Bowman did not want to go back to Penney at that point.

As for the chicken house, Sneed knew Bowman fed Penney's chickens while she lived with Penney. Thus Sneed could reasonably conclude Bowman had mutual use and joint access to the chicken house

while living with Penney. Accordingly, I conclude Bowman had apparent authority to voluntarily consent to the search of Penney's residence and the chicken house. As for the pick-up truck, Sneed testified Bowman asserted no interest in or use of the pick-up truck of any kind. Thus I conclude Bowman did not have apparent authority to consent to the search of the pick-up truck.

B. The January 13, 2004, Search

Police searched Penney's residence on January 13, 2004, pursuant to a search warrant. "Probable cause for the issuance of a search warrant is defined in terms of whether the affidavit sets out facts and circumstances which indicate a 'fair probability that evidence of a crime will be located on the premises of the proposed search.'" *United States v. Finch*, 998 F.2d 349-352 (6th Cir. 1993) (quoting *United States v. Bowling*, 900 F.2d 926, 930 (6th Cir.) *cert. denied*, 498 U.S. 387 (1990)); *see also United States v. Couch*, 367 F.3d 557, 560 (6th Cir. 2004) ("To justify a search, the circumstances must indicate why evidence of illegal activity will be found in a particular place.") (internal citations omitted). A magistrate's probable cause determination should be made in a "realistic and common sense fashion," *Finch*, 998 F.2d at 351, and is entitled to "great deference." *Couch*, 367 F.3d at 557. "The task of the reviewing court is not to conduct a *de novo* determination of probable cause, but only to determine whether there is substantial evidence in the record supporting the magistrate's decision to

issue the warrant. *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984).

The search at issue arose from an anticipatory search warrant. An anticipatory search warrant is one that "'by its terms [takes] effect not upon issuance but at a specified future time.'" *United States v. Miggins*, 302 F.3d 384, 395 (6th Cir. 2002) (citing *United States v. Jackson*, 55 F.3d 1219, 1223 (6th Cir.), *cert. denied*, 516 U.S. 926 (1995)), *cert. denied*, 537 U.S. 1097 (2002), 537 U.S. 1130 (2003), 538 U.S. 971 (2003) (brackets added). The "specified future time" upon which an anticipatory search warrant takes effect is called the "triggering event." *Miggins*, 302 F.3d at 395. "Although courts have required that conditions triggering the anticipatory search warrant be explicit, clear, and narrowly drawn, warrants and their supporting documents are to be read not hypertechnically but in a commonsense fashion." *Miggins*, 302 F.3d at 395 (internal citations omitted).

In this case, the defendant argues the search conducted on January 13, 2004, is invalid for two reasons. First, Penney argues the triggering event specified by the search warrant never occurred, thus agents could not execute it. Second, Penney argues the search warrant affidavit failed to establish a nexus between the contraband, in this case, money earmarked to buy marijuana, and the place to be searched, Penney's residence. I will address each argument in turn.

The search warrant at issue states, "This is an anticipatory search warrant. It is to be executed only upon the occurrences of the events anticipated in the affidavit." (Govt. Exhibit 8, Search Warrant). The affidavit provides:

> It is the intent of the affiant to execute this search warrant only when the following conditions are met:
>
> Penney meets with the CI to examine and attempts to purchase the narcotics by obtaining funds or promising to obtain funds in the near future in order to complete the transaction.

(Govt. Exhibit 8, Search Warrant Affidavit).

Defendant argues the triggering event described above never occurred because it was William North, not Penney, who went outside Penney's house to show the CI the money, *i.e.*, the contraband, for the CI's marijuana.

Penney seeks to impose a hypertechnical interpretation to the triggering event set forth in the affidavit. The Sixth Circuit in *United States v. Miggins* rejected just such a "hypertechnical" approach to anticipatory search warrants in favor of a more "commonsense" application. In *Miggins*, the search warrant was to be executed only when a controlled delivery of cocaine was made to 2335 Cooper Terrace and "possession of the package is taken by someone inside 2335 Cooper Terrace." *Miggins*, 302 F.3d at 389. Immediately prior to the controlled delivery of

cocaine, police conducted a surveillance of 2335 Cooper Terrace and observed defendant enter the residence. When the undercover officer in a Federal Express van arrived to make the controlled delivery, however, the defendant was waiting outside where he received and signed for the package. The defendant did not return to the residence but instead immediately left the premises in his vehicle. Police then executed the search warrant and, while the search was in progress, arrested the defendant. The defendant argued the triggering event did not take place since the package was never taken inside the residence. The Sixth Circuit rejected this rigid interpretation of the triggering event finding "there was sufficient delivery to [defendant's] residence to fulfill the condition of the anticipatory search warrant." *Id.* at 395.

Following the common sense approach of the *Miggins* court, the undersigned concludes the triggering event in this case was satisfied. Penney brought the buyer with the money and the CI together for the transaction at Penney's home where Penney, North, and the CI met to complete the deal. Without Penney, there would have been no buyer, no money, and no deal. That Penney remained inside the house when North and the CI went outside to North's vehicle parked in Penney's driveway does not lessen Penney's role in the deal.

Defendant's second argument, that the warrant fails to establish a sufficient nexus between the contraband and the place to be searched, presents a

more difficult issue – an issue which defendant first raised at the suppression hearing held on July 26-27, 2004. In support of his argument, defendant relies heavily on *United States v. Ricciardelli*, 998 F.2d 8 (1st Cir. 1993). In *Ricciardelli*, the defendant came to police's attention through a customer list discovered during an investigation of a child pornographer distributor. Using a fictitious company called Globe-Tex Specialities, postal inspectors sent a fake catalogue for child pornography to Ricciardelli who placed an order for a videotape. On the day of the scheduled delivery, postal inspectors obtained an anticipatory search warrant which was to be executed only "after delivery by mail to and receipt by Steven L. Ricciardelli of the . . . package containing the videotape." *Id.* at 9. Postal inspectors then gave the package to the local post office for delivery. A letter carrier tried to deliver the package to the defendant's home but he was not there. Following standard procedures, the postman left a notice at the defendant's home that he could retrieve the package at the post office. The defendant did so and returned to his house with the videotape whereupon the postal inspectors executed the warrant.

The First Circuit in *Ricciardelli* set forth a two part test for anticipatory search warrants:

> First, the magistrate must ensure that the triggering event is both ascertainable and preordained. The warrant should restrict the officers' discretion in detecting the occurrence of the event to almost ministerial

> proportions, similar to a search party's discretion in locating the place to be searched. Only then, in the prototypical case, are the ends of explicitness and clarity served. Second, the contraband must be on a sure and irreversible course to its destination, and a future search of the destination must be made expressly contingent upon the contraband's arrival there.

Ricciardelli, 998 F.2d at 12-13. The First Circuit found the search warrant failed to meet the second requirement, referred to by the court as the "sure course standard." The court explained that the "sure course standard," "functions as a proxy for the actual presence of the contraband at the locus to be searched. It offers the magistrate a trustworthy assurance that the contraband, though not yet on the site, will almost certainly be located there at the time of the search, thus fulfilling the requirement of future probable cause." *Id.* at 13. The *Ricciardelli* Court found the search warrant fatally flawed because it authorized a search of defendant's home after delivery of the videotape *to the defendant* rather than authorizing the search only after delivery of the videotape *to the defendant's home*. This omission, the court concluded, thereby failed to establish a nexus between the triggering event, *i.e.*, the criminal activity, and the place to be searched. *Id.* at 13.

> [The] premise on which the warrant rested was that the videotape's arrival would signal the existence of probable cause to believe that evidence of a crime – the videotape itself

> – as well as evidence of criminal predisposition or other nefarious activity was likely located in the dwelling. The warrant's text, however, completely ignored this connection, conditioning the search not on the arrival of the videotape at the place to be searched, but, rather, on appellant's personal receipt of the videotape, wherever he might be and wherever he might take his prize. By the terms of the warrant, once appellant retrieved the package at the post office, the postal inspectors could have searched his abode whether or not appellant brought the contraband there. An anticipatory search warrant that cedes such great discretion to the executing agents cannot withstand constitutional scrutiny.

Id.

Were the undersigned to conclude this case involves a typical anticipatory search warrant like the one in *Ricciardelli*, Penney would have a much better argument that the fruits of the January 13, 2004, search of Penney's house should be suppressed. However, for the reasons that follow, the undersigned does not find the search at issue to involve a typical anticipatory search warrant.

Anticipatory search warrants are typically used in the context of a controlled delivery of contraband. *See e.g.*, *United States v. Miggins*, 302 F.3d 384, 395 (6th Cir. 2002) (controlled cocaine delivery), *cert. denied*, 537 U.S. 1097 (2002), 537 U.S. 1130 (2003), 538 U.S. 971 (2003); *United States v. Bender*, 265 F.3d

464 (6th Cir. 2001) (controlled cocaine delivery); *United States v. Jackson*, 55 F.3d 1219 (6th Cir.) (controlled heroin delivery), *cert. denied*, 516 U.S. 926 (1995); *United States v. Lawson*, 999 F.2d 985 (6th Cir.) (controlled cocaine delivery), *cert. denied*, 510 U.S. 1001 (1993); *United States v. Rey*, 923 F.2d 1217 (6th Cir. 1991) (controlled cocaine delivery); *United States v. Prince*, 1995 WL 355671 (6th Cir. 1995) (controlled cocaine delivery), *cert. denied*, 516 U.S. 935 (1995) and 516 U.S. 1151 (1996). Under the typical controlled delivery scenario, police intercept en route to its intended destination a package containing contraband addressed to an identified and specific premises. *See id.* Police then obtain an anticipatory search warrant which provides that upon controlled delivery of the package to the identified premises, the police will search the premises for the package and other evidence of related contraband. *See id.* Such warrants are found sufficient and searches conducted pursuant to them are upheld. *See id.* In this typical controlled delivery scenario, there is no or precious little evidence connecting the premises to be searched with a crime except for the intercepted package itself. *See id.* Thus, under this typical scenario, in order for the warrant affidavit to set forth probable cause to believe the place to be searched will contain evidence of criminal activity *at the time the warrant is executed*, the warrant affidavit must set forth probable cause to believe the package will be delivered *to the place to be searched* prior to execution of the search warrant. *See id.* Likewise, in order for the anticipatory search warrant to properly set forth the

conditions for its execution, it must require delivery of the contraband *to the place to be searched* prior to execution. *See id.*

This case, however, does not involve a typical controlled delivery anticipatory search warrant. Agents did not intercept a package of contraband in the mail addressed to Penney's residence thereby establishing a nexus between Penney's residence and drug trafficking. Rather, in this case, police had been conducting an ongoing investigation into Penney's alleged drug trafficking activities for months and had gathered other significant evidence connecting Penney's residence to drug trafficking. This nexus between criminal activities and Penney's residence, which I will discuss momentarily in this report, is set forth in the affidavit used to obtain the search warrant for the defendant's house.

The requirement that a search warrant affidavit provide a nexus between evidence of criminal activity and the place to be searched is not unique to an anticipatory search warrant. All search warrants, anticipatory or not, must be supported by probable cause to believe evidence of a crime will be found at the place to be searched. *Illinois v. Gates*, 462 U.S. 213 (1983); *see also*, *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir.) (en banc) ("There must be . . . a 'nexus between the place to be searched and the evidence to be sought.'") (citing *United States v. Van Shutters*, 163 F.3d 331, 336-37 (6th Cir. 1998)), *petition for cert. filed* (Jun. 7, 2004). However, the Fourth Amendment's requirement of probable cause for the

issuance of a warrant is not be applied according to a fixed and rigid formula. *Gates*, 462 U.S. at 230-32. "Probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Id.* at 232. Accordingly, I will not apply an unbending blueprint to this anticipatory search warrant and summarily find that because the triggering event in this case did not expressly require delivery to Penney's residence, then the search warrant for Penney's residence is *per se* invalid. Rather, the question before the undersigned is whether, based upon the totality of the circumstances set forth in the affidavit and using a practical, common-sense approach, a fair probability existed that evidence of a crime would be found at Penney's residence when the search warrant was executed. *Gates*, 462 U.S. at 238; *Carpenter*, 360 F.3d at 594; *Couch*, 367 F.3d at 560.

Det. Sneed's affidavit used to obtain the search warrant for Penney's house included the following: During a consent search of defendant's residence on August 19, 2003, police recovered 18 firearms belonging to Penney and approximately three (3) ounces of marijuana in containers indicative of large scale marijuana distribution. (Govt. Exhibit 8, Affidavit, pars. 1 & 2). On September 18, 2003, Det. Sneed was advised by a detective with the Hamilton County Sheriff's Department that the detective had arrested an Hispanic individual who admitted delivering 100

pounds of marijuana to Penney on or about September 16, 2003. (*Id.* at par. 3.)[1] On January 3, 2004, a confidential informant wearing a wire met with Penney at his residence and discussed making a marijuana transaction in excess of 100 pounds. Penney told the CI to obtain more than 100 pounds of marijuana for $450.00 per pound which could then be sold for $700.00 to $750.00 per pound. (*Id.* at par. 4). Det. Sneed anticipated that on or about January 13, 2004, police will conduct a controlled narcotics delivery wherein the CI will make contact with Penney, inform him he has the drugs, and ask to see the money. Detective Sneed further anticipated that because Penney has previously used his residence and his business to transact drug deals, probable cause exists to believe evidence of this anticipated marijuana deal as well as other illegal drug transactions can be found in Penney's house and business. (*Id.* at par. 5).

On the basis of this information in the affidavit, police showed a significant connection existed between Penney's residence and an ongoing marijuana trafficking business before the anticipated controlled delivery, *i.e.*, the triggering event, occurred. What the triggering event added to the probable cause equation is a more immediate temporal context which was arguably lacking in the rest of the affidavit. When

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[1] The affidavit does not indicate whether delivery was made to Penney's residence.

Penney produced money (via William North) to purchase marijuana on January 13, 2004, regardless of where he delivered the money to the CI, his delivery would unequivocally establish Penney's present involvement in marijuana trafficking thereby indicating there was a fair probability that evidence of drug trafficking (evidence other than the money earmarked to buy the marijuana) would exist at Penney's residence.

In the alternative, I also conclude that the good faith exception articulated in *United States v. Leon*, 468 U.S. 897, 918-21 (1984), applies to the January 13, 2004 search warrant.

> The good faith exception to the exclusionary rule states that the fruits of a constitutionally infirm search need not necessarily be suppressed unless: (1) the warrant contained a knowing or reckless falsehood; (2) the issuing judge acted as a mere "rubber stamp" for the police; or (3) the warrant and the affidavit, even after extending appropriate deference to the issuing judge's determination, did not establish probable cause or possessed a technical deficiency such that the executing officers cannot reasonably assume the warrant to be valid. *Leon*, 468 U.S. at 922-23, 104 S.Ct. 3405.

United States v. Logan, 250 F.3d 350, 366 (6th Cir.), *cert. denied*, 534 U.S. 895 (2001) and 534 U.S. 997 (2001). There is no evidence of a reckless or knowing falsehood by the affiant or that the issuing judge acted as a rubber stamp. Whether the warrant and

affidavit failed to establish probable cause such that the executing officers could not reasonably assume the warrant to be valid is the question before the undersigned. The Supreme Court in *Leon* held that evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant should not be suppressed. *Leon*, 468 U.S. at 922; *see also*, *United States v. Carpenter*, 360 F.3d 591, 594 (6th Cir.) (en banc), *petition for cert. filed* (Jun. 7, 2004). Thus, evidence obtained from a search warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable must be suppressed.

Before addressing this issue, I first note that at the July 26-27, 2004 evidentiary hearing, defendant argued that the *Leon* good faith exception to the exclusionary rule categorically cannot be applied to an anticipatory search warrant because there is no finding of probable cause by a magistrate at the time the anticipatory search warrant is issued. The Third Circuit in *United States v. Loy*, 191 F.3d 360 (1st Cir. 1999), *cert. denied*, 529 U.S. 1023 (2000), explained that while anticipatory search warrants differ from traditional warrants in that they are not supported by probable cause to believe the items to be seized are at the place to be searched *when the warrant is issued*, they are nevertheless supported by probable cause to believe that the items to be seized will be at the place to be searched *when the search warrant is executed*. *Id.* at 364-65. *See also United States v. Bender*, 265 F.3d 464, 469 (6th Cir. 2001) (probable cause existed

to issues anticipatory search warrant); *United States v. Rey*, 923 F.2d 1217, 1221 (6th Cir. 1991) (same). Furthermore, the Sixth Circuit has applied the *Leon* good faith exception at least twice to anticipatory search warrants. *See United States v. Lawson*, 999 F.2d 985, 988 (6th Cir.), *cert. denied*, 510 U.S. 1001 (1993); *United States v. Ware*, 338 F.3d 476, 482 (6th Cir. 2003). Accordingly, I reject the defendant's argument that the good faith exception categorically cannot be applied to anticipatory search warrants.

Because the affidavit supporting the warrant provided significant information connecting Penney's involvement in marijuana trafficking to Penney's residence, and because officers did not execute the search warrant until delivery of the contraband was made to Penney's residence, I conclude the officers acted as reasonable officers would act in executing the search warrant at issue even though the triggering event in the warrant did not require delivery to Penney's house. *See Ware*, 338 F.3d at 482 (relying in part on fact that officers waited until controlled delivery was made to Ware's residence before searching it to apply the good faith exception.) Thus, I conclude this is not a case where the exclusionary rule is necessary to deter police misconduct.

IV. Conclusion

For the reasons stated herein, it is RECOMMENDED that defendant's motions to suppress evidence be DENIED.[2]

/s/ William B. Mitchell Carter
UNITED STATES
MAGISTRATE JUDGE

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[2] Any objections to this Report and Recommendation must be served and filed within ten (10) days after service of a copy of this recommended disposition on the objecting party. Such objections must conform to the requirements of Rule 72(b) of the Federal Rules of Civil Procedure. Failure to file objections within the time specified waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140, 88 L.Ed.2d 435, 106 S.Ct. 466 (1985). The district court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive or general. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987).

No. 05-6821

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	ORDER
v.	)	(Filed Sep. 24, 2009)
TERRY EUGENE PENNEY,	)	
Defendant-Appellant.	)	

BEFORE: MERRITT, BOGGS, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk